CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 676

GEORGE S. BEADLE, PETITIONER,

vs.

ALFRED SPENCER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JANUARY 3, 1936.

CERTIORARI GRANTED FEBRUARY 17, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No.

GEORGE S. BEADLE, PETITIONER,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. 1]

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 234720

ALFRED SPENCER, Plaintiff,

vs.

BEADLE STEAMSHIP COMPANY, LTD., a Corporation, GEORGE S. BEADLE, Black-White Company, a Corporation, Jim Doe Company, a Corporation, Black and Blue, a Co-partnership, Richard Roe and Mary Miles, Defendants

FIRST AMENDED COMPLAINT—Filed June 29, 1932

Not comes the plaintiff and upon stipulation of counsel and leave of Court being first had and obtained, files this first amended complaint and for cause of action alleges:

I

That the defendant, Beadle Steamship Company, Ltd., is and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of California, and maintaining a main office and principal place of business in the City and County of San Francisco, State of California.

II

That the defendants, or some of them, were at all times herein mentioned, in the possession of and were the owners of and were operating that certain vessel known as the S. S. Fort Bragg. That plaintiff is not certain as to just which of said defendants were so in the possession of and were [fol. 2] the owners of and operating the said S. S. Fort Bragg, at the times herein mentioned and prays that the defendants be put upon answer to this allegation.

III

That the names Black-White Company, a corporation, Jim Doe Company, a corporation, Black and Blue, a co-

partnership, Richard Roe and Mary Miles are to designate defendants whose true names are not at this time known to plaintiff and that said names are fictitious and plaintiff prays that when said true names are ascertained that this first amended complaint may be amended accordingly; and that such defendants are added solely for the reason that plaintiff is in doubt as to what particular defendant was actually in the possession of, and was the owner of, and was operating the said vessel at the time of the accident hereinafter referred to.

IV

That for some time prior to and on or about May 4, 1931, plaintiff had been and was a seaman on board the S. S. Fort Bragg, and a member of the crew thereof, and as such was in the employ of the defendants or some of them; that plaintiff is not certain as to which of said defendants was his actual employer, and for that reason prays that said defendants be put upon answer regarding same.

V

That on or about said date of May 4, 1931, about 9:00 o'clock A. M., the plaintiff was engaged as such seaman and [fol. 3] as a member of the crew of the said S. S. Fort Bragg on board said vessel while docked at Vallejo, California, helping to unload a deck cargo of lumber aboard said vessel, and was under the direction of the defendants engaged in making up sling loads of flat lumber for unloading, and was, in the course of his duties, standing on the lumber landed on the deck of the vessel, near the hatch-coaming on the port side thereof, and was so engaged in the course of his duties under the direction and control of said defendants as his employer or employers, when the defendants, who were in the possession of and who were the owners of and who were then and there employing said plaintiff as a member of the crew to help unload said deck cargo of lumber, and which said defendants were then and there the employer or employers of said plaintiff, had so negligently loaded the said vessel with its deck cargo of lumber and were so negligently carrying on the unloading operations on said vessel at said time and place of said unloading, by so negligently landing the lumber on the deck, upon which lumber plaintiff was compelled to stand in the

course of his duties, and by negligently failing to secure said landed lumber by blocking or otherwise to prevent shifting or toppling of the landed sling-loads of such lumber, and by negligently landing said lumber too close to the hatch-coaming of said vessel and the open hold thereof, and by so negligently leaving the hold open while plaintiff was working in the course of his duties to unload said deck cargo, there being no cargo passing into or from said [fol. 4] hold that entire day, and by so negligently failing to have a safety line stretched around the hatch-coaming to protect this plaintiff from falling into said open hold, and by so negligently failing to furnish plaintiff with a safe place to work on said vessel, that by reason of the aforesaid negligence and all of said negligent acts, the landed lumber on which plaintiff was standing, shifted and toppled under plaintiff and by reason of all of the aforesaid negligent acts the plaintiff was caused to, and said defendants did by reason of all of such negligent acts cause plaintiff to, and he did, fall with great force and violence from the top of said landed sling-loads of lumber, through the open hatch-way and into the open hold of said vessel, thus causing him to fall about eighteen feet into the hold, causing the plaintiff grievous shock and injury and much pain and suffering and the following additional specific injuries to plaintiff, to-wit: a fracture of the right astragalus, dislocation of the right metacarpo-phalangeal joint, and a serious sprain of the left ankle, and a falling down of the arch of the right foot, and in addition thereto, knocking loose three of plaintiff's lower front teeth, which subsequently had to be taken out about three months after said date of May 4, 1931, by reason of their failure to again become firm in plaintiff's jaw.

That as a result of said negligence of said defendants the plaintiff was confined in the Marine Hospital at San Francisco, California, from May 4, 1931 to May 22, 1931, when [fol. 5] he was placed in an out-patient status. As a further result of the negligence of said defendants and at the insistence of said defendants, the plaintiff entered the Saint Francis Hospital at San Francisco, California, on June 17, 1931, and at the request of the defendant Beadle Steamship Company, Ltd., underwent an operation on June 19, 1931, as a result of the negligence of said defendants and in order to mitigate the seriousness and the permanence of the

aforesaid injuries of said plaintiff by reason of said negligence, in which said operation plaintiff's right arm and right hand around the thumb were cut open for the purposes of correcting the result of the injuries to said right hand of plaintiff, received as aforesaid, and thereupon plaintiff's right hand and arm, half way to the elbow, was placed in a plaster cast. That as a result of said operation this plaintiff suffered extreme and continued pain and discomfort and worry and apprehension. That on entering said hospital, plaintiff's right foot, which had been injured as aforesaid as a result of the negligence of the defendants on May 4, 1931, was placed in a plaster cast which cast remained on until on or about July 15, 1931. That plaintiff was not released from said hospital until July 17, 1931.

That thereafter plaintiff suffered extreme and continued pain in said right foot which was injured at said time and place as aforesaid, to-wit: on May 4, 1931, and during all of said time was suffering continued pain and discomfort and lack of use of his left ankle. At the request of the defend- [fol. 6] ant, Beadle Steamship Company, Ltd., x-rays of said right foot were taken and at the request of the said defendant, the plaintiff again entered the Saint Francis Hospital at San Francisco, California, on October 1, 1931, and at the request of said defendant was again operated, on or about October 3, 1931, in an endeavor to mitigate the injuries received by said plaintiff on May 4, 1931, in which said operation an incision was made in plaintiff's right foot and a piece of bone taken out of said foot. That plaintiff was released from said hospital on November 8, 1931. That thereafter and up to the summer of 1932, plaintiff was and is still partially disabled and in a weakened and unstable condition and his right ankle has not fully recovered, and the left ankle still gives pain, and that said injuries are permanent to the extent that plaintiff will always be deprived of the use of said right thumb to a considerable extent and that said right thumb is permanently stiffened and that plaintiff will never have the full use of his said right foot, and that the loss of plaintiff's three lower front teeth constitute a permanent injury and that plaintiff by reason of the aforesaid negligence of the defendants has suffered extreme and continued pain and considerable apprehension and worry and that plaintiff's earning ability was entirely destroyed by said injuries up to May 1, 1932,

and since that time has been and will continue to be considerably diminished, and plaintiff is now, at the time of the filing of this First Amended Complaint, able to do only light work, and cannot follow his usual vocation of a sea-
[fol. 7] man at all, and plaintiff will always be permanently disabled to some extent, all to plaintiff's damage in the sum of $35,000.00, which has not been paid nor any part thereof.

VI

That there was no cargo loaded into nor any cargo taken out of said hold on said May 4, 1931, the day of said injuries to plaintiff, nor was said hold used that day. That the said lumber on which plaintiff was thus compelled to stand in the course of his duties, while unloading said deck cargo of lumber, was not piled but was landed on the deck, where it lay as landed sling-loads, without piling or arranging the separate pieces of lumber. That in negligently failing to pile said lumber on which plaintiff was standing at the time of said injuries to plaintiff, and negligently failing to secure the said deck cargo of lumber on which plaintiff was working to prevent shifting or toppling, and in negligently piling said lumber too close to said open hold and hatch-coaming thereof, and in negligently failing to protect the open hold by a safety line and by negligently leaving said hold open when this plaintiff was working in the course of his duties so close to said open hold, the said hold not being used that entire day, the defendants violated well-known safety rules.

Wherefore, plaintiff prays that the above entitled cause be tried before a jury and that he recover of and from said defendant employers the sum of $35,000.00 damages and costs of suit herein, and such other and further relief as
[fol. 8] to the above entitled Court may seem just.

A. Don Duncan, Attorney for Plaintiff.

(*Duly sworn to by Alfred Spencer. Jurat omitted in printing.*)

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

ANSWER TO FIRST AMENDED COMPLAINT—Filed July 5, 1932

Now comes Beadle Steamship Company, Ltd., a corporation, and George S. Beadle, two of the above-named defendants, and for an answer to the First Amended Complaint of the plaintiff on file herein, admit, deny and allege as follows:

I

Admit the allegations of paragraphs I, II, and IV of the First Amended Complaint.

II

Deny the allegations of Paragraph III of the First Amended Complaint.

III

Answering unto the allegations of paragraph V, said defendants admit that on or about said date of May 4th, 1931, the plaintiff was engaged as a seaman and as a member of the crew of the said steamship "Fort Bragg" on board said vessel while docked at Vallejo, California, helping to [fol. 9] unload a deck cargo of lumber aboard said vessel, and was under the direction of the defendant, Geo. S. Beadle, engaged in making up sling loads of flat lumber for unloading and was, in the course of his duties, standing on the lumber landed on the deck of the vessel near the hatch coaming on the port side thereof; admit that defendant Geo. S. Beadle was then and there employing said plaintiff as a member of the crew to help unload said deck cargo of lumber; deny each and every allegation of paragraph V not hereinabove expressly admitted.

IV

Deny the allegations of paragraph VI of the First Amended Complaint.

Further answering unto the First Amended Complaint on file herein, and for a First Affirmative and Separate Defense thereto, said defendants allege as follows:

I

That on the 4th day of May, 1931, the plaintiff, while performing his ordinary duties as a seaman aboard the steam schooner "Fort Bragg" fell from a deckload of lumber on said vessel into the hold of the said vessel, and that the defendants did not cause the plaintiff to fall into the said hold; that the risk of falling from said deckload of lumber was obvious and apparent, and was one of the risks of plaintiff's employment as a seaman; that the plaintiff assumed the risk of falling from said deckload of lum-
[fol. 10] ber; that the plaintiff assumed all the apparent and obvious risks incidental to his employment as a seaman aboard the said vessel, and that if any injuries were sustained by plaintiff, such injuries were proximately and directly caused by a risk assumed by the plaintiff.

Further answering unto the First Amended Complaint on file herein, and for a Second Affirmative and Separate Defense thereto, said defendants allege as follows:

I

That on the 4th day of May, 1931, the plaintiff, while performing his ordinary duties as a seaman aboard the steam schooner "Fort Bragg," fell from a deckload of lumber into the hold of the said ship, as a direct and proximate result of the plaintiff's own carelessness and negligence in the performance of his said duties; that in the performance of his said duties he acted without regard to his own safety; that he failed and neglected to exercise ordinary, or any, care toward the safety of his own person, and that if the plaintiff has received any injuries as a result of falling from said deckload, said injuries were caused by the recklessness, carelessness and negligence of the plaintiff.

Wherefore, said defendants pray for judgment and for their costs of suit incurred herein.

Sawyer & Cluff, Attorneys for defendants, Beadle Steamship Company, Ltd., and George S. Beadle.

(*Duly sworn to by George S. Beadle. Jurat omitted in printing.*)

[fol. 11] [File endorsement omitted.]

Received Jul. 5, 1932.

A. Don Duncan, Attorney at Law.

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

VERDICT—Filed Jan. 10, 1933

We, the jury in the above-entitled cause, find a verdict in favor or plaintiff and against the defendant George S. Beadle and assess the damages in the sum — Ten Thousand Dollars $10,000.00 Dollars.

Louis D. Saylor, Foreman.

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

JUDGMENT ON VERDICT—Filed Jan. 16, 1933

This cause came on regularly for trial A. Don Duncan, Esq., appearing as counsel for the plaintiff, and Messrs. Sawyer & Cluff for the defendant.

Thereupon, a jury of 12 persons was duly accepted, empaneled and sworn to try said cause. Witnesses on the part of the plaintiff and defendant were duly sworn and examined, and certain documentary evidence was introduced.

Whereupon, after hearing the evidence, the arguments of Counsel and instructions of the Court, the cause was submitted to the jury, who retired to deliberate upon their verdict, and subsequently returned into court, and, being [fol. 12] called, all answered to their names, and then rendered the following verdict, which was accepted by the Court and entered on the minutes, as follows:

We, the jury in the above-entitled cause, find a verdict in favor of plaintiff and against the defendant George S. Beadle and assess the damages in the sum of Ten Thousand Dollars $10,000.00.

Louis D. Saylor, Foreman.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that Alfred Spencer plaintiff do have and recover from George S. Beadle defendant, the sum of Ten Thousand & no/100 Dollars ($10,000.00) $7,000., with interest thereon at the rate of seven percent per annum from the date

hereof, till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $417.25. (In red ink:) Mch 1/1933. Reduced to $7000.—by order of Court. G. A. Weihe, D. C. C.

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

STIPULATION CONSENTING TO A REDUCTION OF THE PRINCIPAL AMOUNT OF JUDGMENT AS CONDITION TO DENIAL OF MOTION FOR NEW TRIAL—Filed March 1, 1933

Pursuant to the conditional order of the above entitled court, made and filed herein on February 27, 1933, ordering that the motion of George S. Beadle, defendant herein, [fol. 13] for a new trial be granted on the ground of excessive damages, unless the plaintiff herein file a written stipulation consenting that the principal amount of said judgment be reduced from $10,000 to $7,000, said written stipulation to be filed herein on or before March 4, 1933, and that said motion for a new trial be denied if such stipulation is filed.

Pursuant to said order, it is hereby stipulated and agreed by Alfred Spencer, the above named plaintiff that said plaintiff consents that the principal amount of the judgment herein be reduced from $10,000 to $7,000, and that said motion for new trial be denied.

Dated San Francisco, California, March 1, 1933.

Alfred Spencer, Plaintiff; A. Don Duncan, Attorney for Plaintiff.

Witness to signature of Alfred Spencer: Isabelle Stewart.

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

ORDER DENYING MOTION FOR NEW TRIAL—Filed March 1, 1933

Pursuant to the order of this court made and filed on February 27, 1933, ordering that the motion of George S.

Beadle defendant herein, for a new trial be granted on the ground of excessive damages unless the plaintiff should file herein within five days from said date of stipulation consenting that the principal amount of said judgment be reduced from $10,000 to $7,000.

[fol. 14] And the plaintiff, Alfred Spencer, having filed in this action on this 28th day of February, 1933, his written stipulation consenting that the principal amount of said judgment be so reduced and the plaintiff having fully complied with the condition of said order of February 27, 1933, and good cause appearing therefor,

It is hereby ordered, that the motion for new trial of George S. Beadle, defendant herein, be, and it is hereby denied and

It is further ordered that the principal amount of the judgment heretofore entered herein be reduced from the sum of $10,000 to the sum of $7,000, and the clerk of this court is hereby authorized and directed to correct the principal amount of said judgment accordingly; this order not to affect the amount of plaintiff's costs already taxed.

Dated San Francisco, California, March 1, 1933.

Edmund P. Mogan, Judge of the above entitled Superior Court.

[File endorsement omitted.]

(Clerk's certificate to judgment omitted in printing.)

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

NOTICE OF APPEAL—Filed March 7, 1933

To the Honorable Edmund P. Morgan, Judge of said Superior Court, to Alfred Spencer, plaintiff in the above-entitled action, and to A. Don Duncan, Esq., his attorney:

[fol. 15] You, and each of you, will please take notice that George S. Beadle, the defendant in the above-entitled action, hereby appeals to the District Court of Appeal, First Appellate District, of the State of California, from the judgment in said action rendered in favor of the plaintiff, Alfred Spencer, and against the defendant, George S.

Beadle, and entered on the 16th day of January, 1933, in Judgment Book 341, Page 104 of the records of the Superior Court of the State of California, in and for the City and County of San Francisco, and from the whole of said judgment.

Dated March 7th, 1933.

Sawyer & Cluff, Attorneys for Defendant.

Receipt of a copy of the within Notice of Appeal is acknowledged this 7th day of March, 1933.

A. Don Duncan, Attorney for Plaintiff.

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

NOTICE AND REQUEST FOR TRANSCRIPT—Filed March 7, 1933

To the Clerk of the above-entitled Court:

Please take notice that the defendant, George S. Beadle, in the above-entitled action desires to appeal from the judgment in said action, and hereby requests that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the Court, also all objections or exceptions of counsel, and all matters [fol. 16] to which the same relate, and also all proceedings taken on motion for new trial and all matters to which the same relate, including all minute orders and written orders pertaining to said motion for new trial, and also the record of defendant's motion for non-suit, defendant's motion for a mistrial, defendant's motion for a directed verdict, defendant's request for a special verdict and written findings of fact, defendant's motion for judgment notwithstanding the verdict together with the Court's ruling on said motions and requests and all written documents filed with the Court in support of or incorporating said motion for mistrial, said motion for directed verdict and said request for special verdict and written findings of fact, also all challenges to jurors put by plaintiff's counsel, opening statement made by plaintiff's counsel and argument to the jury made by plaintiff's counsel, together with a record of all requests and objections made by defendant's counsel during said argument,

also a record of all formal offers of evidence made by counsel, also that portion of plaintiff's counsel's argument against defendant's motion for non-suit in which the plaintiff's knowledge of the construction of the No. 9 slingload is denied by plaintiff's counsel, and also that portion of plaintiff's counsel's argument against defendant's motion for a directed verdict in which the plaintiff's knowledge of the construction of the No. 9 slingload is affirmed by plaintiff's counsel, be made up and prepared, in accordance with the provisions of Section 953-a of the Code of Civil Procedure of the State of California.

[fol. 17] Dated March 7th, 1933.

Sawyer & Cluff, Attorneys for Defendant.

Receipt of a copy of the within Notice and Request for Transcript is hereby acknowledged this 7th day of March, 1933.

A. Don Duncan, Attorney for Plaintiff.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 18] In Superior Court of City and County of San Francisco

STATEMENT OF EVIDENCE

Monday, December 12th, 1932, 10 o'clock A. M.

(The above-entitled cause came on regularly for hearing before the above-entitled Court, plaintiff being personally present and represented by his counsel A. Don Duncan, Esq., and defendants being represented by Webster Street, Esq., and Daniel W. Evans, Esq., of counsel for defendants. A jury was thereupon duly empaneled to try the above-entitled cause, which thereupon proceeded to trial as follows:)

OPENING STATEMENT ON BEHALF OF PLAINTIFF BY A. DON DUNCAN

Mr. Duncan: May it please the Court, and ladies and gentlemen of the jury, this is an action brought by a seaman, Alfred Spencer, against the Beadle Steamship Company, Ltd., and George S. Beadle, for personal injuries sustained by him while he was a member of the crew of the Steamship Fort Bragg. The action is brought under the provisions of a Federal Statute known as the "Jones Act." * * * That as the plaintiff with his partner was trying to take the heavy sling underneath this sling load to have it taken out the lumber which had been landed in there, not piled, toppled [fol. 19] with him, and some of the lumber fell over with him, threw him down off this narrow shelf into the open hold; that he tried to catch himself, of course, and dragged some of the lumber in with him, but the hold was open, there it was yawning beneath him. * * *

ALFRED SPENCER, the plaintiff called as a witness in his own behalf, and having been first duly sworn, testified as follows: 78 13th Street, San Francisco, California.

Direct examination.

Mr. Duncan:

Q. Mr. Spencer, you are the plaintiff in this case?
A. Yes sir.
Q. And your vocation is seaman, is it?
A. Seaman.
Q. How long have you been engaged as a seaman?
A. I have been a seaman since 1908.
Q. Since 1908?
A. Yes.
Q. Do you know any other vocation at all?
A. I didn't get you. Any other employment?
Q. Well, I mean do you know—you don't know how to do anything else besides being a seaman?
A. No, no, that is all I know—seaman.
Q. You were employed on the Fort Bragg May 4th, 1931, weren't you?
[fol. 20] A. Yes.

Q. How long prior to that had you been employed on the Fort Bragg as a seaman?

A. About 40 days.

Q. Forty days before that?

A. Yes.

Q. You had made how many trips on the Fort Bragg prior to this trip?

A. That was the finish of the second trip.

Q. The finish of the second trip?

A. The second trip, yes.

* * * * * * *

The Court:

Q. Who did you speak to, in other words?

A. Well, I was—well, I joined the ship, you know—it is Captain Samuelson who is the commander of the ship, you know, but every pay day I got paid by young Beadle, not by Captain Samuelson.

Q. By George S. Beadle?

A. Yes.

Mr. Evans:

Q. By young Beadle. Do you know his initials?

A. No, I don't know his initials.

Q. Do you know in what capacity young Beadle was working with relation to that vessel?

A. Well, no.

[fol. 21] Q. You don't know?

A. I don't know. The only thing is when a pay day came we received a check of him, and it was signed by Beadle.

* * * * * * *

The Court:

Q. When did you start to work in and about the ship Fort Bragg, thirty days before the accident?

A. About forty.

Q. I say, was it about thirty days before the accident?

A. No, forty days before the accident.

Q. Forty days?

A. Yes.

Q. Where, San Francisco?

A. San Francisco.

Q. You were hired here?
A. Yes sir.
Q. Had you worked before for this Fort Bragg steamer in any capacity?
A. I had worked before for the same company on the Wilmington.
Q. How long before?
A. Well——
Q. Well, six months or a year before?
A. No, no. About three months before that.
Q. At Wilmington, California?
A. Yes.
[fol. 22] Q. What were you doing there?
A. The same kind of work.
Q. On the same ship?
A. No. I mean the same company on the Wilmington.
Q. Were you working on the same ship? Were you working on the same ship or another ship?
A. On another ship.
Q. Another ship of what company?
A. Of the Beadle Steamship Company.
Q. And were you doing the same kind of work?
A. Same kind of work.
Q. Then you were off for two or three months?
A. I was.
Q. Then you were engaged in San Francisco?
A. In San Francisco.
Q. By someone. And you went aboard the steamship Fort Bragg, is that it?
A. Yes, your Honor.
Q. Then you finally went with the ship to Vallejo, is that it?
A. We went up North.
Q. Did you finally go to Vallejo, California? Did you finally land at Vallejo, California?
A. Yes.
Q. And that is where the accident happened?
A. Yes, that is where the accident happened.

• • • • • • •

[fol. 23] Mr. Duncan:

Q. Mr. Spencer, you are an American citizen, are you?
A. Yes sir.

Q. But you were born where?
A. In Latvia—Riga.

The Court: Where is that?
Mr. Duncan: Riga. It used to be in Russia, but I understand there is a new republic there now called Latvia.

Q. And whatever education you had you had there—did you?
A. I had——
Q. In Latvia?
A. I had a public school.
Q. Public school?
A. Yes.
Q. Now, what has been your experience as a seaman?
A. My experience?
Q. Yes. What kind of—had you had any experience on similar schooners, coasters, prior to the Fort Bragg?
A. Yes, for the last eight years.
Q. The last eight years. And as a member of the crew of the vessels?
A. Yes.
Q. And as a member of the crew you generally had to assist in loading and unloading the vessel, didn't you?
A. Yes sir.
Q. At all times?
[fol. 24] A. All times.
Q. That is, sometimes the vessel was—you had some assistance from stevedores?
A. Yes.
Q. But you generally had to help, the seamen had to help?
A. Yes, the seamen had to help.
Q. Now, on May 4th, 1931, you were rated as a—what is known as an A. B. on the Fort Bragg?
A. Yes.
Q. That is abled bodied seaman, that is what that means, isn't it?
A. Yes.
Q. And did you ship for a voyage from here to——
A. To the Columbia River and back.

* * * * * * *

Q. Now, when you went north with the vessel to Columbia River District, did you load a cargo of lumber?

A. Yes.

Q. And just describe generally the appearance of the Fort Bragg as to the deck loads of lumber on it after she was fully loaded in the Columbia District?

A. Well, we had a load of timber in one place, and then we went to another place.

Q. Do you remember the names of those place?

A. No, I cannot remember the names of those places.

[fol. 25] Q. Well, some place in the Columbia River?

A. Some place in the Columbia River.

Q. Yes.

A. But we loaded timber in one place.

Q. Yes.

A. And we loaded lumber in another place. First we loaded with timber, and then after we loaded timber we went up to another place and loaded the lumber.

Q. Now, were these heavy timbers?

A. The timbers were heavy.

Q. About how big?

A. Well, they was something like 16 by 18.

Q. About 16 by 18?

A. Yes, about that.

Q. Well, you didn't measure them, of course?

A. I didn't measure them, no.

Q. Were they long?

A. They was long. They was the length of the ship.

Q. The length of the ship?

A. Yes, from past one tank up to the forward tank.

Q. By the way, do you know how long the Fort Bragg was?

A. Well, closer to 100 foot, but not the space for landing the lumber on the deck.

Q. Now, the Fort Bragg carried oil, too, didn't it?

A. Yes.

Q. Gasoline?

[fol. 26] A. Gasoline.

Q. And it had two big tanks on the deck, did it not?

A. On the deck. They had more than two tanks.

Q. More than two tanks?

A. More than two tanks.

The Court:

Q. Well, about how many?
A. Four.

Mr. Duncan: Four.
The Court: And how high were they, counsel, estimated?
Mr. Duncan: About how high—just a minute.
Mr. Evans: If the Court please, before that diagram is shown, we would like to object to it on the ground it purports to show the loading of the lumber on board, and we think that is something that probably the witnesses should——
The Court: Yes, I will pass upon that at recess time. Don't show it to the jury. Just ask how high were the tanks estimated.
Mr. Duncan: Well, take one at a time. The tank at the forward end of the vessel, about how high was there?

A. Well, them tanks is pretty near even, somethin 12 feet.

The Court:

Q. About 12 foot?
A. Well, I am not sure about it.
Q. No, about will do. Of course, you are not sure.

Mr. Duncan:

[fol. 27] Q. And that forward tank, was it square or round?
A. Square.
Q. It was square?
A. Square.
Q. And that was a steel tank?
A. Steel tank.
Q. And about how big was it, about what dimensions did it have?
A. Well, I couldn't tell you that.
Q. Can you form some estimate of it?

The Court:

Q. The side of the square was how long, 2 feet, 3 feet, 5 feet, 6 feet, 8 feet?
A. About 10 foot, at least, 10 foot in length.

The Court: It covered—it was a square, and what did it cover now, 10 foot of space in a square, or what?

A. Well, it was not even a square.
Q. It was not an even square?
A. I am not sure about that if it was even square.
Q. I see.

Mr. Duncan:

Q. Would you say it was about ten feet square, that is, 10 feet one way and 10 feet another way?
A. Yes. Well, I am——
Q. About that?
A. Yes.

[fol. 28] Q. And this forward tank was placed how far in front of the forward part of the hatch coaming around the hold?

A. Well, it was 3 foot, you know, from the forward part of the hatch.

Q. And then it was set right square on the deck there, wasn't it?

A. Well, it was set—not right on the deck, you know, but they had some kind of blocking underneath.

Q. Oh, they had some blocking underneath it?
A. Yes.

Q. So that including the blocking, about how high was the top of this tank from the deck level?

A. About 18 inches, 12 or 18 inches from the deck, you know, up to the tank, the blocking.

Q. In other words, the top of the tank, then, would be about 13½ or 14 feet from the deck?
A. Yes.

Q. Now, there was some space between the sides of this tank and the side of the vessel, wasn't there?
A. Yes.

Q. Then the rear—the after part of the vessel, were there other tanks?
A. No.
Q. There were no tanks in the back part of the vessel?
A. Oh, in the back part of the vessel?
Q. The after part?

[fol. 29] A. The after part. Yes. There was three.
Q. Three?
A. Yes.

Q. Was there one in the center, that is, corresponding to the one on the forward——

A. What?

Q. Was there one in the center?

A. In the center.

Q. I mean amidships, corresponding to the forward tank, the same position?

A. In the same position.

Q. And how big was that tank in the after part of the vessel?

A. Well, as much as I know it was the biggest tank on deck.

Q. The biggest one on deck?

A. The biggest one on deck.

Q. And how much of a space was there between that tank and the after part of the hatch?

A. The same thing as in the forward.

Q. About——

A. About——

Q. (Continuing) —12 inches?

A. About 3 feet.

Q. Then were the other two tanks in the after part of the vessel?

[fol. 30] A. Yes.

Q. And where were they with reference to the big tank in the back part?

A. They were farther back, and the middle tank was more sticking out to the forward—to the forward part of the hatch; I mean the forward part of the ship; and the after tanks was more back. They was smaller.

Q. I see.

A. They was about five or six feet back of the middle tank.

Q. But they were all about 13½ or 14 feet high, were they, from the deck?

A. Yes, they had an even height.

Q. Now, how much deck space did these heavy timbers take? How were they loaded on the ship? I mean how much space did they take, and how high was the deck load of heavy timbers?

A. Well, the deck load of heavy timbers was about 10 foot.

Q. About 8 feet?

A. About 10 foot from the deck.

Q. About 10 feet from the deck?
A. From the deck.
Q. High?
A. Yes.
Q. And then——

The Court:

[fol. 31] Q. Where were they, what part of the ship, what part of the deck?
A. Well, on the side—there was just from the tank to the bulwark of the ship.

Mr. Duncan:

Q. In other words, these heavy timbers were loaded in between the tanks and the side of the ship?
A. Between the tanks and the side of the ship.
Q. Were they?
A. Yes.
Q. And did they take up the whole side, both sides of the ship there, these heavy timbers?
A. Yes, both sides of the ship.
Q. They took up all of the deck practically?
A. All of the deck, only except that space from the tank and the hatch.
Q. Now, there was a space after the heavy timbers were loaded on both sides of the vessel between the heavy timbers and the hatch coaming, was there?
A. There was lumber, yes.

The Court: Estimated 3 foot, didn't he?
Mr. Duncan: No, your Honor, that is the space from the hatch cover to the side of the front tank. Now, I am asking him as to the space between the side of these heavy timbers loaded on top of the deck and the hatch coaming.
The Court: All right.
[fol. 32] Mr. Duncan: On the side of the ship.
The Court: I see.

Mr. Duncan:

Q. You say there was a little space there?
A. There was a little space left there.
Q. Now, how wide was that space, about?
A. About—up to the hatch coaming about 40 inches.

Q. About 40 inches?

A. About 40 inches.

Q. And the same space was on the other side of the hold, too?

A. Exactly.

Q. And how far did that space run?

A. That space run from one tank up to the other.

Q. In other words, the two steel tanks, the big ones, projected out beyond the square of the hatch, did they?

A. Yes.

Q. About 40 inches?

A. Yes, about 40 inches.

Q. And the heavy timbers loaded right up against the side of the tanks?

A. Yes.

Q. And that left this space between the heavy timbers and the hatch and between the two steel tanks on both sides of the hatch?

A. Yes.

[fol. 33] Q. Now, did you load anything in that little space there?

A. Yes, we loaded lumber.

Q. You loaded lumber?

A. We loaded lumber, yes.

Q. Do you remember where it was taken on?

A. Well, I am not sure, but I think it was West Port.

Q. Is that on the Columbia River?

A. That is on the Columbia River.

Q. And by whose orders was that lumber put in this space?

A. Well, by the Captain's order.

Q. By the Captain's orders?

A. Yes.

Q. And were you ordered to put this lumber in there, some of it?

A. Yes.

Q. And did you also have assistance from stevedores up in that West Port, or wherever this was?

A. West Port, yes.

* * * * * * *

Q. Now, was there any of this heavy timbers in this space here (indicating)?

A. No, because it was too long.

Q. It was too long to get in between?

A. Too long to get in.

[fol. 34] Q. Between these tanks here, was it?

A. Yes.

Q. Now, you have testified about some smaller lumber being put in there?

A. Yes, small lumber was put in there.

Q. That was taken on at West Port, you think?

A. I think it was—well, I am not sure, but I think it was West Port.

Q. And what kind of lumber was that?

A. Well, it was 2 by 3's or 2 by 4's, and 1 by 8's.

Q. And what length was it?

A. Well, some of them was—some of them reached out up to the middle of the hatch, and they came two short lengths in the forward.

Q. And two short lengths. Did you load any part of that lumber under the orders of the officers of the vessel?

A. Yes.

Q. What part did you put on there?

A. I put on the after part.

Q. The after part?

A. The after part of the hatch.

Q. But where were you working when you finally unloaded this lumber under the order of the officers at Vallejo?

A. On the forward hatch.

Q. On the forward part?

A. Yes.

[fol. 35] Q. In other words, you were working on lumber when you were unloading that you had not put on the vessel?

A. Yes.

Q. Did you know how the lumber on the forward part was loaded?

A. No.

Q. Who was that put on by?

A. That was put on by stevedores.

Q. Stevedores at West Port?

A. Yes.

Q. Will you just state how high that lumber was in that narrow space there?

A. Well, in that narrow space it was high about 12 foot.

Q. About 12 feet?
A. 12 feet.

The Court:

Q. From the deck?
A. From the deck going over the big timber. After we evened with the timber then we loaded lumber all over.

Mr. Duncan:

Q. In other words, you built up this space here to the top of the heavy timbers about 10 feet, and when you got even with that you loaded lumber all over the top?
A. Yes.
Q. How high was the entire deck load when you got all through?
[fol. 36] A. When we got all through about 14 or 15 feet high.
Q. Was it level with the top of those tanks?
A. No, it ran over the top of the tanks.
Q. It ran over the tanks?
A. It ran over the tanks.
Q. How did you put that lumber in at the after part there that you loaded?
A. Well, we had the hatches on. We went to load—the first load, you know, we stowed in.
Q. What does stowing mean?
A. It means we put piece by piece. When you get 12 inches high, that is, below the lumber, if it comes on the outer edge, you have to have 12 inches high and put some—some laths, 4 foot long, and you usually put them across at a distance of 3 foot, you know. Always one and then another so far, to bind the lumber.

The Court:

Q. It makes it more secure?
A. More secure. That is the proper way to work on lumber.

Mr. Duncan:

Q. Now, you say when you started to load this lumber that the hatch covers were on?
A. Were on, yes.
Q. And then how did you load the rest of the lumber?

Were you doing this under the orders of the mate or captain?

[fol. 37] A. We do everything under the order of the mate or the captain.

Q. How did you load the rest of the lumber where you loaded it?

A. When we loaded—well, we go by the orders of the mate and the captain—land them—we cannot disobey.

The Court:

Q. Land what?

A. Land the loads, your Honor, after we stowed them. It was getting higher up. Well, the mate says, "Go ahead and land them."

Q. What does that mean?

A. The way they pick up the whole load from the dock. They take them and land them all in a bunch. They don't stow them no more piece by piece.

Q. You are talking now of putting it in position or taking it off?

A. No, putting it in.

Mr. Street: We ask that that they obey orders be stricken out, your Honor.

The Court: Stricken out. The rest remains.

A. Landing the loads until we got to the top of the tank, and then we started to stow piece by piece again.

The Court:

Q. Up to the top of the tank?

A. No, until we got even with the timber.

[fol. 38] Q. I meant the top of the rest of the timber?

A. Yes. Then we start to put them piece by piece again.

Q. Like you did at the bottom?

A. Yes, like we did at the bottom.

Mr. Duncan:

Q. Now, maybe for the benefit of the jury you had better explain more the custom aboard ship with loading. This lumber came aboard in what is known as a sling, didn't it?

A. In a sling.

Q. In other words, you got one sling load at a time?

A. One sling load at a time.

Q. And a sling is simply part of the ship's tackle, a wire sling, or wire sling that goes around—heavy wire sling?
A. Yes.

Mr. Evans: If the Court please, I suggest the witness explain the method of loading.
The Court: Well, if there is no doubt about it, it is all right.
Mr. Street: Further, your question, Mr. Duncan, is a general question.
Mr. Duncan: Yes, just a general question.
Mr. Street: It covers all ships and all kinds of lumber.

The Court:

Q. Well, what kind of a sling was used to load this ship?
A. Well, the sling to load the ship——
[fol. 39] Q. What kind do they use, do you know?
A. Yes, I will describe it.
Q. Take your time.
A. That sling is about 12 foot long.
Q. Made out of what?
A. Steel wire, your Honor. It is about three-quarters of an inch thick. Well, then——
The Court: Do they put the lumber in that sling on shore?
A. Yes.
Q. Then they lock it?
A. Yes.
Q. Then they pull it out to the deck of the ship, hoist it?
A. Hoist it.
Q. Who takes the lumber out of the sling when it is on the deck of the ship, the men on the deck?
A. Yes, the men on deck.
Q. Piece by piece?
A. Well, that is the proper way, you know, to work on lumber.

Mr. Street: Just a moment.
The Court: Strike that out.

Q. Did you take it out piece by piece, or just dump the load?

A. No, from the start we took it piece by piece until when [fol. 40] we couldn't land no more load, you know.

Q. Yes.

A. We couldn't stow no more piece by piece. The mate says, "Go ahead and land them."

Q. When the lumber came in this—what do you call it?

A. Sling.

Q. And came on the ship or was lowered down to the point where you wanted to get hold of it, how did you take it out of the sling?

A. Just unhooked it.

Q. Did you take piece by piece?

A. Well, on the landed loads we didn't take piece by piece.

Q. What did you do?

A. Land the load and let the sling out.

Q. Leave the whole load there?

A. Yes.

Q. Then you distributed it?

A. Well, evened it out.

Q. Go ahead.

A. Well, after we was even with the timber, then we went all over the deck, loaded piece by piece. We didn't land no more loads.

Mr. Duncan:

Q. Mr. Spencer, would it—I will withdraw that.

Q. Now, then, you gave the—after this was filled, the en- [fol. 41] tire deck load on both sides, how far was it then from the edge of this smaller lumber to the side of the hold here, to the hatch coaming?

A. Well, about 7 or 8 inches.

Q. 7 or 8 inches?

A. Yes.

The Court: The space between you mean?

Mr. Duncan: Yes.

A. Between the empty hold and the pile of lumber.

The Court:

Q. Deck space of about 7 or 8 inches?

A. 7 or 8 inches.

Q. How long? As long as the hold?
A. As long as the hold.

Mr. Duncan:

Q. And that was in three lengths, you say?
A. In three lengths, one long length and two short lengths.
Q. Now, how big were those sling loads put in there?
A. Well, the longer ones was over 20 feet. I am sure about that, over 20 feet, over.
Q. And how wide were they?
A. Well, about 36 inches, no wider.
Q. About 36 inches?
A. About 36 inches.
Q. And how high was the sling load when it was landed, [fol. 42] that is, a landed sling load?
A. Well, they come like in a square, you know. Well, about 36 inches.
Q. About 36 inches?
A. About that.
Q. About 3 feet?
A. About that.

* * * * * * *

Mr. Duncan:

Q. When you came down with that loaded vessel from the North, where did you land first here in the Bay District?
A. Always we land at Pier 24.

The Court:

Q. In San Francisco?
A. Yes, the most of the time.

Mr. Duncan:

Q. Do you remember when you got in here prior to May 4th?
A. No. May 4th? We didn't get in on May 4th. It was May 2nd. Yes, May 2nd we was up in Vallejo unloading lumber already.
Q. May 2nd was Saturday?
A. Saturday.

Q. I see.
A. We finished with it at 3 o'clock.
Q. At Vallejo?
A. Yes.
[fol. 43] Q. When you got into Vallejo, then, Saturday afternoon or Friday——
A. No, we went Saturday morning in there already.
Q. Saturday morning in Vallejo?
A. Yes.
Q. Then what did you unload in Vallejo?
A. We had the shingles in the hold.
Q. You had shingles in the hold?
A. Yes. We unload the shingles in the hold, and everything out from the hold. Then there was some shingles left on deck.
Q. Do you mean the top of the deck load?
A. Yes.

Mr. Street: What day is he talking about?
Mr. Duncan: Saturday.
The Court: At Vallejo.

A. They was on deck. On deck was the remainder of the order of shingles.

Mr. Duncan:

Q. Do you mean you left it on deck Saturday? Do you mean you left it on deck Saturday, the remainder of the order of shingles?
A. No. Well, yes, we took the shingles out, and keep drawing on the remainder of the shingles, and we didn't unload all the shingles on Saturday. Some was left Monday morning.
Q. Now, when you—in other words, Saturday at Vallejo [fol. 44] you were unloading the top of this deck load, were you?
A. Saturday?
Q. Yes.
A. No.
Q. Were you unloading that, or were you unloading shingles?
A. We was unloading—we stopped work on that lumber, and some of those fellows was working on the shingles with us.

Mr. Street:

Q. Which lumber?
A. The deck load.

Mr. Duncan:

Q. But you did unload some of the cargo from the hold Saturday at Vallejo?
A. Yes.
Q. What time did you knock off Saturday?
A. 5 o'clock.
Q. Did you close this hold and put on the hatch covers?
A. No.
Q. I mean were you ordered to close it?
A. No.
Q. You don't do anything on board ship unless you are ordered to do it, do you?
A. Nothing.
Q. A seaman cannot do anything unless he is ordered?
A. Only under orders.
[fol. 45] Q. Then the hold was not closed?
A. It was not closed.
Q. How did you leave that open hold Saturday night at 5 o'clock?
A. Well, we stretched a life line around.
Q. You stretched a life line around where?
A. On the edge about 3 foot from the edge of the hatch.
Q. 3 foot from the edge of the hatch?
A. 3 or 4 feet from the edge of the deck load, see.
Q. Oh, 3 or 4 feet from the edge of the deck load?
A. Yes.
Q. On top of the deck load you put a life line around?
A. Yes.
Q. That was to protect anybody from falling into the open hold?
A. Yes, during the night coming on board.
Q. By the way, how old were you when this accident happened?
A. What.
Q. How old were you when this accident happened?
A. How old?
A. Yes.

A. Well, December 5th—just now ago—I was 41 years of age.

Q. December 5th, 1931?

A. Yes.

[fol. 46] Q. In other words, you were 40?

A. 40, yes.

Q. All right. Now, then, what happened Monday morning there?

A. Well, Monday morning——

Q. The day of this occurrence?

A. Well, the mate told us to work.

Q. Was that safety line removed from around there?

A. Yes, it had to be removed.

Q. Before you started any work?

A. Yes, before we started to work.

Q. Then what were you ordered to do?

A. Started to make loads up.

Q. Of what?

A. Of this here lumber.

Q. Do you mean—indicating the lumber on top of the deck load?

A. Yes, on top of the deck.

Q. That was clear above the heavy timbers?

A. Above the heavy timbers.

Q. By the way, about how high was this lighter lumber above the top of the heavy timber?

A. Well, I couldn't say exactly, maybe two feet. But no more than two feet.

Q. What time did you start to work?

A. Started to work at 8 o'clock.

[fol. 47] Q. At 8 o'clock?

A. At 8 o'clock.

Q. And then did you finally get this lumber, lighter lumber, off the top of the heavy timbers?

A. Yes.

Q. And you got down to the level of the heavy timbers and these smaller sling loads, did you?

A. Yes.

* * * * * * *

Mr. Duncan:

Q. Just what happened that morning?

A. Well, we went around—the mate turned us out in the

morning to work. Well, we started to work on the lumber, finished there and proceeded going down.

Q. Did he tell you to——

A. Certainly. That is his orders.

Q. And was the hold open?

A. The hold open.

Q. Was there any protest made against working right next to an open hold, up right above an open hold?

A. Yes.

* * * * * * *

Mr. Duncan:

Q. Did you make any objection?

A. I did not, but my partner did.

* * * * * * *

[fol. 48] Q. What was his name?

A. His name is William Paul.

Q. Did he speak to anybody?

A. He spoke to the mate.

Q. To you?

A. Well——

Q. He spoke to the mate?

A. He asked the mate, he says——

The Court: Well don't say that. Did he speak to the mate?

A. Yes.

Q. Well, if he spoke to the mate in his presence, I think that would be admissible.

Mr. Street: Well, that is all right, yes.

The Court:

Q. Well, what did he say to the mate, at that time and place?

A. He said, "Ain't we going to close the hatch?"

Q. He said, "Are you going to close the hatch"?

A. Yes.

Q. What did the mate say?

A. "Never mind."

* * * * * * *

Mr. Duncan:

Q. Now, how long would it have taken to have that hatch closed at that time?

[fol. 49] A. Between five or ten minutes. As long as ten minutes.

* * * * * * *

The Court:

Q. Where were you?

A. I was here on the port side.

Q. Forward, is that it?

A. Yes.

Q. Next to the hatch?

A. Next to the hatch.

Q. When you say you were there, do you mean you were on top of the lumber there, on top of the pile of lumber that was there?

A. On top of it.

Q. And where was Paul, your partner?

A. He was working the same place where I was.

Q. Point to the spot again where you were?

A. We was working right here when the accident happened. (Indicating.)

Q. Where did you do your piling?

A. What?

Q. You said yesterday you piled on the back?

A. Yes.

Q. Then you moved forward to where the other men had piled?

A. Oh, your Honor, I loaded the ship—load and unload in the forward.

[fol. 50] Q. You were unloading the fore part?

A. Unloading the fore part.

Q. At the time of the accident?

A. Yes.

Q. Who had loaded that fore part?

A. Stevedores.

Q. Not you?

A. Not me.

Q. Point to that fore part.

A. Here (indicating).

Q. And you were unloading that, were you?
A. Yes.
Q. You and Paul, your partner?
A. Yes.
Q. Is that when the accident happened?
A. That is when the accident happened.

* * * * * * *

Mr. Duncan:

Q. Mr. Spencer, before I ask you to describe your fall, will you just indicate what the condition of that hold was, that is, whether or not there was anything in the hold?
A. Yes.
Q. Just—can you illustrate that?

(Witness marks on diagram.)

Q. There was lumber across the bottom of the hold, was there?
A. Yes sir.

* * * * * * *

[fol. 51] Q. Lumber left in there?
A. Left in there.
Q. You had taken out some?
A. We had taken out some, you know.
Q. Yes.
A. Because the ship carried freight, too.
Q. She carried freight, too?
A. She carried freight in the hold.
Q. You had taken out freight from the hold?
A. We was taking out freight from the hold and shingles.
Q. Shingles?
A. In bundles, you know.
Q. That was Saturday you did that?
A. Yes.
Q. Had you got down to the lumber there in the bottom of the hold?
A. We got down to the lumber.
Q. When was this, Saturday?
A. That was Saturday.
Q. When you shut down Saturday?

A. We shut down with the hold on Saturday.
Q. I mean you shut down work?
A. Yes.
Q. Stopped work?
A. Yes.
Q. You didn't close the hold Saturday?
A. No, no. no.

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[fol. 52] Mr. Duncan:

Q. Then will you just tell the Court and jury what happened—and counsel—on this morning in question, and how it happened, and where it happened, in your own words?
A. Well, after we was through with the top of the lumber, we started to work from the inside, inside the timber on the hatch coaming.
Q. About what time did you start to work on that lumber on the inside——
A. Well, it was between 9 and 10.
Q. All right.

Mr. Street:

Q. You started to work between 9 and 10?
A. We started to work at 8 o'clock.
Q. That is what I thought.
A. Yes.

Mr. Duncan: And he says he started on the lumber next to the hatch coaming about 9 o'clock.
The Court: Point to it.

A. It was between 9 and 10 when we started on this here. (Indicating.)
The Court: All right.
A. We took the first two loads off. First—the first load went off this one here, and then the second one went off there. (Indicating.)
[fol. 53] Mr. Duncan:

Q. Now, these two loads you have just referred to were sling loads up about even with——

Mr. Street: Now, wait a minute. Ask him where they were.
Mr. Duncan: All right.

Q. Where were these two sling loads of lumber with reference to the top of the heavy timbers piled on the deck?

A. I cannot get you.

Q. Well, you have indicated two sling loads that you have taken off. I just want to place those with reference to the top of these heavy timbers. Were they sling loads that were about even with the top of the heavy timbers?

A. Yes, they was even with the top of the timbers. Well, we took off the first two loads. Then we went after the third load.

The Court: Point up there first.

A. And then we proceeded on the third load.

Q. Point to it.

A. Well, on the third load there. It was the second tier. (Indicating.)

Mr. Duncan:

Q. In the second tier?

A. In the second tier, yes.

Q. After you had taken off the two top sling loads, then you started on the next two sling loads underneath?

A. Underneath, yes.

[fol. 54] Mr. Street: Do I understand this correctly, that you took out the two first sling loads off one forward and one aft on the port side?

The Court: The two top tiers, and left the remaining tiers. Did you take off the two top tiers?

A. We took the two top tiers off.

Q. What did that leave, other tiers underneath?

A. Other tiers underneath, all right here now (indicating).

Q. Yes. You took off the two top tiers, and that left several tiers beneath?

A. Yes.

Mr. Street:

Q. What do you mean by tiers?

Mr. Duncan: Maybe I can make it clearer.

Q. Mr. Spencer, supposing you erase here what you have indicated as the loaded deck down to where you were work-

ing at the time you are describing now. Suppose you erase that for the time being. You testified you had already taken off this lumber (indicating)?

A. Yes.

Q. Well, erase that. And you testified you had taken off these two top sling loads here even with the top of the timbers?

A. Yes.

Q. So erase that top sling load for the time being so as to indicate at what point you had arrived here.

[fol. 55] Mr. Street: Well, when you do that, Mr. Duncan, please indicate the numbers of sling loads in some way so we will know what he is taking off.

Mr. Duncan: Yes. Will you do that, Mr. Spencer, please?

A. Well, that is what I explained.

The Court: As I understand it—maybe I am mistaken—when they put this lumber in the sling loads it was smaller lumber than the big timbers, and then it was placed in tiers or some position right here, wasn't it? (Indicating.)

A. Yes.

Q. It was piled up here in tiers, so to speak?

A. Yes.

Q. It was as high as this (indicating)?

A. Yes.

Q. Then you removed the top tier here and the top tier here, and another tier here and another tier there (indicating)?

A. Yes.

Q. That reduced it below that? (Indicating.)

A. Yes, it was below.

The Court: That is plain enough.

Mr. Street: No, he has testified they landed it in sling loads. They landed this lumber that he is taking off in sling loads.

The Court: Originally?

Mr. Street: Yes. Now, he has taken it off. I assume when he says tiers he means sling loads. Now, those sling [fol. 56] loads are separate.

The Court:

Q. When those sling loads were placed there in the sling, did the sailors or the men in charge, or whoever was there,

did they straighten them out in tiers, pile them certain ways, or just dump them in?

A. They just landed them.

Q. Never touched them?

A. Don't touch them.

Q. They just piled up as they came out of the sling load?

A. Yes.

Q. When you say tiers——

A. I call that a tier. This is one tier, this is second, and this is third. That is the way I mean (indicating).

Mr. Street: I don't think the Court and jury have the correct picture of this yet. You don't mind if I try to get this thing straight?

Mr. Duncan: It's all right. Go ahead.

Mr. Street:

Q. These sling loads, Mr. Spencer, come on deck already made up, don't they?

A. Yes.

The Court: Are they tied?

Mr. Street: Well, they are when they come on, but of course they take the slings off afterwards.

A. They take the slings off.

[fol. 57] Q. Those are what they call package lots, don't they?

A. They don't call them——

The Court: Are they tied together?

A. No, sir, they are all loose boards.

Q. Are they dumped right out of the sling loose as they are right into the place there?

A. Into the space there. (Indicating.)

Mr. Street: Well, you say dumped.

A. No, not dumped. Landed.

Mr. Street: I think the Court and jury got the wrong picture. That lumber is not picked up, is it, in a net?

A. No.

Q. It is all piled on the dock, isn't it, in lengths?

A. In lengths.

Q. Then they put a sling around it?

A. A sling around it.

Q. And then it comes on the deck, and they just lay it down there the way it came on board, and then they take the sling off?

A. Yes.

Q. Now, when you say tiers, I would like to have the witness indicate on this diagram where these separate sling loads are. Are those little marks supposed to be separate sling loads?

A. Separate sling loads.

The Court:

[fol. 58] Q. When they are taken out of the sling are they tied together?

A. No.

Q. Well, what makes them separate, after they are all put in one bundle there? They are piled on top of each other, aren't they?

A. 36 foot high and about 40——

Q. There is no division line between them?

Mr. Street: Yes, they put blocks under them, don't they?

A. You only put the block when you land the load.

Q. Yes.

A. You have to put, you know, some piece underneath.

The Court:

Q. Each time?

A. What binds them, secures them all.

Mr. Street: Sure.

The Court:

Q. Do you pile one on top of the other?

A. Well, in the proper way.

Q. I say, is that done? You take what is in the sling load and put a board underneath it on the deck, and then you put the sling load on. Then when the next sling load comes along you put another board there?

A. Yes, sir.

Q. That is what they call tiers?

A. Yes.

• • • • • • •

[fol. 59] Mr. Duncan:

Q. Will you just designate where you were working at the time you fell?

A. Well, I was working on the second tier here (indicating).

Q. On the second tier there?

A. Yes.

• • • • • • •

Mr. Duncan:

Q. Now, how high were you at that time above the hatch coaming?

A. Above the hatch coaming?

Q. Yes.

A. Above the hatch coaming about—between 5½ or 6 foot.

• • • • • • •

Mr. Duncan:

Q. Where was Paul standing?

A. On top of the load.

Q. He was on top of the No.—what you have designated No. 5 load?

A. No. 5 load.

Q. At which end?

A. On the forward end.

Q. Forward end?

A. Forward end.

Q. And what was he doing with reference to this pick-up sling?

[fol. 60] A. Well, he helped me to hook it on when the hook came down, you know. We had a pick-up sling behind the load, and then he done the hooking it, you know.

Q. He hooked the sling on the ship's tackle?

A. He was on the top and I was down below standing.

Q. You were standing on what you have numbered as No. 9 sling load?

A. No. 9 sling load.

• • • • • • •

Mr. Duncan:

Q. Now, go ahead, please, and explain about this?

A. Now, when we have the pick-up sling around this load here—that load was——

Mr. Street:

Q. That is No. 5 load?

A. No. 5.

Q. Which end did you have the pick-up sling around?

A. On the forward end. Well, I was standing on No. 9 load. My partner was standing on top. They hooked on the pick-up sling and give the order to raise. The load I was standing on looked to me good and solid, looked to me solid.

Mr. Duncan:

Q. No. 9 load?

A. No. 9 load. When they raise the load—and my partner had this end with the hook in his hand, and I——

Q. Did they swing that load out any?

[fol. 61] A. Just a little.

Q. Why did they have to do that?

A. Well, so you could get by, you know.

Q. In other words, you were right up against this heavy timber, and it had to be swung out?

A. Swung out a little bit.

Mr. Street:

Q. Did you use any peevee bar to get it out with?

A. I don't remember.

The Court: Let him tell his story. Go on.

A. My partner was standing and holding this end of the sling, because you have to hold on to that.

Mr. Street:

Q. Which end of the sling is that?

A. The end with the hook.

Q. And the loop, too?

A. And the loop, too, yes, sure. Well, I pushed the sling through.

Mr. Duncan:

Q. Through what?
A. Through the load.
Q. Underneath?
A. Yes.

Mr. Street:

Q. Who did?
A. Me. Pushed the end through this loop, so I could [fol. 62] get it out from the other side. I had my hand on the load, had my hand on the load like that, and I went—put my foot there and the other there, and went over to get the hook out, to get the loop out, pulled out. When I pulled—when I pulled this out from under the load, I put my foot over—I had to put my foot on the outer tier of the load.

Mr. Street:

Q. No. 9 load?
A. No. 9 load. When I wanted to pull that—I had ahold already, and then I pulled. The little strain on it—more weight when you pull that—when I started to pull with more weight, the outer tier gave way, shifted.

The Court:

Q. Then what?
A. Gave away, and I lost my balance.
Q. And what?
A. And down I went in the hold.
Q. To the bottom?
A. Yes, to the bottom.

Mr. Street:

Q. Did the whole tier give way?
A. Well, only one give way, and I had my hand on the top of the load. But that lumber was not enough to hold my weight. When I went down the lumber went with me.

Mr. Duncan:

Q. How much of the lumber?
[fol. 63] A. Well, I cannot recollect that.

The Court:

Q. More than one piece or a dozen?
A. Oh yes, about a dozen pieces anyway.

* * * * * * *

Mr. Duncan:

Q. You have had experience on lumber schooners, have you, Mr. Spencer?
A. Yes.
Q. And in taking care of sling loads of lumber?
A. Yes.

* * * * * * *

The Court:

Q. Did you ever work on a ship where they loaded timber on a lumber ship and also loaded boards and scantlings?
A. Yes.

* * * * * * *

The Court:

Q. Well, you worked as a seaman for seven or eight years piling lumber on lumber ships?
A. Yes, your Honor.

* * * * * * *

Mr. Duncan:

Q. Do you know whether or not this lumber on which you were working, getting out the sling loads, was loaded in there like that with laths every 12 inches? Do you know [fol. 64] that or not? The lumber that you were working getting out?
A. Well, of course, I could see by the unloading——

Mr. Street:

Q. See by what?
A. When we unload I could see the loads we was taking out, that they was landed.

* * * * * * *

The Court:

Q. I am asking for the definition of the word—"landed." What does "landed" mean?

A. Well, you take—landed means when you take a load from a dock.

Q. From a sling?

A. From a dock, ready-made loads.

Q. In a sling?

A. Yes, ready-made loads from a dock and land them on the boat, and don't pile them.

Mr. Duncan:

Q. That is a landed load?

A. That is a landed load.

* * * * * * *

Mr. Duncan:

Q. Now, let us see if you understand that, Mr. Spencer. Do you mean that there were cross boards every 12 inches?

A. No, no, not every 12 inches, because they was landed loads, they was not piled.

* * * * * * *

[fol. 65] Mr. Duncan:

Q. Now, I may as well get through with this lumber, if I can. Now, will you state again the construction, the general construction of this sling load No. 9, on which you were standing, in just as simple and direct terms as you can? The one on which you were standing when you fell?

A. Yes.

Q. That would be No. 9 on the diagram?

A. Yes. Well, that was the kind of lumber like this here (indicating).

Q. Now, when you say like this here, what are you referring to, the 2 by 3's or the 1 by 12's?

A. Well, it was a load—it was stowed lumber. I don't know if it was a load or stowed underneath. I don't know that. I mean piled or landed load. I don't know about that. But it was——

Q. Now, just what do you mean by stowed, exactly?

A. Well, stowed, you know, means put down piece by piece.

The Court:

Q. The same as piled?
A. Yes.
Q. Stowed and piled are the same?
A. Yes.
Q. And landed is different?
A. Yes.

* * * * * * *

[fol. 66] Mr. Duncan:

Q. If you had not obeyed the mate's orders to work there, could they have held up payment of your wages?

* * * * * * *

The Court:

Q. Is there a custom or practice?
A. The mate don't hold the wages back. It is the Captain. Well, if I quit on my own accord, he can hold back my money for three days.

Mr. Duncan:

Q. He could have?
A. Yes.
Q. And did you have any money?
A. Well, I had a whole pay day coming then.

The Court: Counsel wants to know if you were discharged for not obeying some order, then what?

A. Oh, if the mate discharged for disobeying orders, he has to pay me right away.

Mr. Duncan:

Q. Oh, if you get discharged for disobeying orders?
A. Yes.
Q. Could they have done it while you were in Vallejo?
A. Yes, he could have done that in Vallejo. It was up to him to pay me right away, if I would have disobeyed orders.

* * * * * * *

[fol. 67] Cross-examination.

* * * * * * *

Mr. Street:

Q. Then how do you know that this was a landed sling load?

A. Well, I could see it.

Q. You could see it?

A. Yes.

Q. When it was loaded?

A. Well, I could see when I unload.

Mr. Duncan: Just a minute, Mr. Street. Will you make plain what you mean by this? You say how do you know this was a landed sling load.

Mr. Street: I am talking about No. 9.

A. Oh, yes. I could see that it was stowed lumber, I mean that it was a landed load.

Q. You could see No. 9 was a landed load when?

A. When I looked over it.

Q. When?

A. Well, when I looked when I was working there.

Q. When, what day?

A. Well, May 4th.

* * * * * * *

Mr. Street:

Q. Now, you testified yesterday that you didn't know whether No. 9 was a landed load or a stowed load?

A. Well, it looked to me, though, like it was a landed load.

[fol. 68] Q. It looked to you like a landed load?

A. Yes.

Q. But you don't know?

A. Well, it looked to me, and that is all I know.

Q. You don't know, though, whether it was a landed load or not, do you?

A. Well, it looked like a landed load, because it was even butts.

* * * * * * *

Mr. Street:

Q. And she had cargo for Vallejo both in the hold and on deck?

A. Yes, she had.

Q. All right. Now, those hatch covers, Mr. Spencer, they don't appear in here yet, but who takes those hatch covers off?

A. The sailors.

Q. The sailors do it?

A. Yes.

Q. Did you help take the hatches off the ship on this trip when she got into Vallejo?

A. We didn't take them off in Vallejo.

Q. You took them off in San Francisco?

A. In San Francisco.

Q. And you helped them take them off in San Francisco?

A. Yes.

[fol. 69] Q. Where did you put them?

A. Half goes aft.

Q. Up in here (indicating)?

A. Half goes here and half goes there. (Indicating)

Q. And you helped take them off?

A. Yes.

* * * * * * *

The Court:

Q. Why did you fall at that time when you stepped? What happened?

A. Well, I don't remember what happened.

Q. Did the lumber stand firm there, or did it——

A. Well, the load was raised and I reached after the sling. There was another load up here, that was going over on this under load, and then I reached after the heavy sling, when I reached, off I went.

Q. Why?

A. Well, something—I wasn't solid underneath.

* * * * * * *

The Court:

Q. Yes.

A. Sometimes it isn't clear underneath, you know. Then you push through and see if it is clear, and push it through.

So when it was through I get up and I went and stepped with my foot and had my hand on the load and went over to reach that—to reach the sling, you know.

[fol. 70] Q. Yes.

A. And when I reached over, then it give away under me.

Q. Where did it give away?

A. Out there (indicating).

Q. On the port side?

A. Yes.

Q. Where was the hold?

A. Right here (indicating).

Q. Right here?

A. Yes.

Q. And you fell in the hold from that point?

A. I fell in the hold.

Mr. Street:

Q. Now, Mr. Spencer, as a matter of fact, it would be quite possible, wouldn't it, to stand here and take this sling like this and just pass it under like that and hand the end to your partner standing on top?

A. Well, it is all right, Mr. Street—if it would be possible I was working there and I would do it, but it wasn't possible. That is the only way I could get the sling under.

* * * * * * *

[fol. 71] WALTER PAUL, sworn as a witness for plaintiff, testified as follows:

* * * * * * *

Mr. Duncan:

Q. Now what were you and Mr. Spencer doing just before he fell, if he did fall?

A. Well, we were trying to put a sling on a load of lumber.

Q. Can you describe the position of that load that you were trying to put a sling under?

A. Well, we had already sent out the top tier and we were working on the second tier, and we had sent out the forward load on the second tier.

Q. You had sent out the forward load on the second tier?
A. Yes.
Q. By that do you mean lower layer?
A. Yes, layer or tier.
Q. Go ahead.
A. And we were working on that, that tier had three loads and we was working on the middle load.
Q. Yes. And just describe rather fully if you will, in your own words what you were doing and what Spencer was doing and what happened and how it happened.
A. Well, we had already put—we had put the pick-up sling underneath the forward end of the load, and the winch driver had lifted up the load. I was on the top of the load and Spencer was standing down below on the next tier. [fol. 72] And he was passing the sling up to me, to put in the middle of the load when he—when the lumber he was standing on—several pieces capsized—well, turned over under his foot, and he fell down the hold.

* * * * * * *

Mr. Duncan:

Q. Just go ahead.
A. And he was—he had almost got the sling underneath and was about to pass it to me when the lumber he was standing on turned under his foot and he fell into the hold.

* * * * * * *

The Court:

Well why not ask him: you saw where Spencer was when he dropped. How far was that to the top of the hatch covers if the hatch covers were in position?

* * * * * * *

The Court:

What is the answer, Mr. Witness?
A. Five or six feet.

* * * * * * *

Cross-examination.

* * * * * * *

Mr. Street:

Q. Oh, about this life line. The boat was lying in port on Sunday, wasn't she, over in Vallejo?

A. Yes.

Q. And on Sunday the men are off, are they not?

[fol. 73] A. Yes.

Q. There was no work done on Sunday on the boat?

A. No.

Q. But the sailors on this boat live on there, don't they?

A. Yes.

Q. That is their quarters?

A. Yes.

Q. And they come home at all hours of the night, don't they?

A. Yes.

Q. And naturally if they are off on Sunday they don't have to get back at five o'clock or four o'clock or anything like that. They come when they want to just as long as they are there on Monday morning?

A. Yes.

Q. Now that life line stretched around the open hatch is to keep them from falling in, isn't it?

A. Yes.

Q. Now they take that life line off when they start to work, don't they?

A. Yes.

Q. And what is the reason of that?

A. Well, you couldn't—it would be in the way of the work.

Q. Of course it would. In other words, every time you [fol. 74] came over with a slingload it would catch there, wouldn't it?

A. Yes.

The Court:

Q. The life line is only for protection walking on the deck, is that it?

A. Yes, sir.

Mr. Street:

Q. You testified on direct examination that no lumber was taken out of the hold that Monday at any time?

A. No, there was not.

Q. But there was lumber in the hold that was going to Vallejo, wasn't there?

A. Yes.

Q. And was there any fixed time when that was to come out, if you know?

A. No, there was no fixed time so far as I know.

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[fol. 75] GEORGE S. BEADLE, called as a witness on behalf of plaintiff under Section 2055 of the Code of Civil Procedure, and having been first duly sworn, testified as follows:

Cross-examination.

* * * * * * *

Mr. Duncan:

Q. Now, Mr. Spencer—you made out a check to him on May 4th, and then cancelled the signature and give him the cash for it when he was hurt, is that so?

A. Yes, sir.

Q. For his wages?

A. For his wages. And he signed the payroll.

Q. Yes.

* * * * * * *

[fol. 76] JOHN SAMUELSON, called as a witness on behalf of the defendant and, having been first duly sworn, testified as follows:

1205 Tenth Avenue, San Francisco, California.

Direct examination.

Mr. Street:

Q. Captain, I just want to ask you a few questions now, and I will state for the record that I intend to recall the

Captain later. Captain, were you the—or who was the Captain of the Fort Bragg in May, 1931?

A. I was, sir.

Q. You were the Captain. What was the Fort Bragg's length?

A. 188 feet and 5 inches.

* * * * * * *

Q. At that time, Captain, were there any timbers on board the ship?

A. Yes, sir.

Q. Will you tell us how long they were and how many?

A. They was 52 feet long, 100 pieces.

Q. And do you remember the size of those pieces?

A. 12 by 14.

* * * * * * *

Mr. Street:

Q. Did you see Mr. Spencer on the morning he fell?

A. Yes, sir.

[fol. 77] Q. When did you first see him?

The Court: Before he fell or after?

Mr. Street:

Q. Before?

A. A few minutes before—or after 8 o'clock.

Q. What?

A. A few minutes after eight o'clock.

Q. That is the first time you saw him was a few minutes after 8 o'clock?

A. Yes, sir.

Q. At that time what was Mr. Spencer doing?

A. Slinging lumber.

Mr. Duncan:

Q. Where?

Mr. Street:

Q. Whereabouts?

A. On top of the timbers.

Q. Now, what was Spencer doing when you saw him shortly after 8 o'clock?

A. He was first slinging two by threes from the deck, and then a load of 1 by 12's.

Q. Did you say anything to him?

A. Yes, sir.

Q. What?

* * * * * * *

Mr. Street:

[fol. 78] Q. What did you say to him?

A. I told him not to go inside of the load when he was putting the sling on, towards the hatch, on the side towards the hatch.

Q. Well, did you see him trying to do that?

A. Yes, sir.

* * * * * * *

Mr. Street:

Q. Now, Captain, when you looked down in the hold, where was Spencer?

A. He was in the port side of the forward end of the hatch in the hold.

Q. And how far aft of the forward coaming of the hatch was he?

A. He would be 4 or 5 feet. I wouldn't say because I didn't measure the distance.

Q. Well, what is your estimate?

A. Some 4 or 5 feet.

Q. And as you—did you stand and look over at him?

A. I was right on the edge of the deck load towards the hatch.

Q. What kind of lumber were you standing on?

A. 1 by 12.

* * * * * * *

Mr. Street:

Q. Now, Captain, as you stood and looked down at Spen-

[fol. 79] cer in the hold, did you stand on any lumber at all?

A. Yes.

Q. Now, what kind of lumber was it? Where was the lumber you were standing on?

A. It was between the timbers and the hatch.

The Court:

Q. At what point?

A. The port side forward..

Mr. Street:

Q. And did you stand on the very edge of that lumber?

A. Yes, sir.

The Court: I would ask him where he stood and not say if he stood on the very edge. It is leading. However, there is no objection. Proceed.

Mr. Street:

Q. Was the lumber under your feet 1 by 12's like those (indicating)?

A. Yes, sir.

Q. Oh, Captain, did you notice whether you were standing on a sling load or not?

A. Yes, sir.

Q. Were you standing on a sling load?

A. No, sir.

* * * * * * *

Mr. Street:

Q. Captain, what are pick-up hooks?

[fol. 80] A. A pick-up hook?

Q. Yes. What do they call those pieces of wire?

Mr. Duncan: Now, you ask him to describe what it was.

Mr. Street: Oh, all right. I am trying to get along here.

A. It is a wire hook. It is a stiff wire about—some of them about the size of a pencil. We use them on board the ship.

Q. What do they look like?

A. They bend by themselves when they get hold of a wire like that on both ends. You can use either end with a hook on like that. You use them to get underneath loads,

and then get a sling from the other side, put this wire into the eye of the sling and pull it from under.

Q. That is what they are used for?

A. That is what they are used for.

Q. Were there any such pick-up slings on the Fort Bragg on May 4th, 1931?

A. Slings or hooks?

Q. Pick-up hooks?

A. Yes, sir.

Q. Were there any at the forward part of the ship on the deck load?

A. We keep them both forward and aft.

* * * * * * *

[fol. 81] Mr. Street:

Q. Now, Captain, I am going to reframe that question. Suppose you have a deck load of lumber and it is stowed so that there are timbers running from the forward to the aft part of the ship on the outside of two tanks such as there were on the Fort Bragg. Are you familiar with that situation?

A. Yes, sir.

Q. Assume that the——

Mr. Duncan: You mean on the inside, don't you?

Mr. Street: No, they are on the outside of the tanks. Aren't the timbers stowed up against the outside of the tanks?

Mr. Duncan: Oh, yes.

Mr. Street:

Q. Those timbers were stowed up against the outside of the tanks, and the timbers are stowed 10 feet high. Assume that there is a space between the timbers and the hatch coaming which is loaded with lumber. We cannot specify what kind, can we?

Mr. Duncan: No.

Mr. Street: On your evidence. We don't know the kind of lumber it is. But assume that the sling load, at least, that is going to be taken out is about—the top of the sling load is about 3 feet below the top of the timbers. That is

correct, isn't it, from your evidence? Assume further that the sling load you are taking out is a sling load of 1 by 8's. Assume further, Captain, that the sling load you are to take out is about—now, here we come to another impasse, [fol. 82] because Mr. Spencer's testimony is that forward sling——

Mr. Duncan: Now, wait a minute. Suppose you don't state before this witness what his testimony was.

Mr. Street: Well, you are probably right. Assume, at least, Captain, that this sling load of lumber you are going to take out is up near the forward part of the ship between the timbers and the coaming, and that the space that you are working in there is about—3 feet to 40 inches—is that the testimony?

Mr. Duncan: About 3 feet.

Mr. Street: Yes, about 3 feet. Now, assume further, Captain, that the sling, the pick-up sling, is placed on the forward end of the load about 10 feet aft of the forward hatch coaming, and that the—in that position the gear, the fall that comes down from the booms, is in a position running from the fore part of the sling load you are going to take out—is running forward of that up on a slant, so that if you pull up—oh, and assume further now that there is something in the way underneath the sling load so that it is not possible at that time to loop the heavy cargo sling around the outside of the load. Now, under those facts, as I have stated, Captain, is there any way in which that sling load can be made fast with the cargo sling other than placing the loop from the inside part to the other side that sticks out over the coaming, over the hatch?

Mr. Duncan: I am going to object to that question first, [fol. 83] that this witness has not been qualified to testify on those customs of handling slings and sling loads aboard ship. He appears to be an officer of the vessel, but it doesn't appear that he is qualified to testify as an expert on picking up sling loads.

The Court: What about that, counsel?

Mr. Street: He has been on lumber schooners for thirty years.

The Court: Even so.

Mr. Street: All right.

Q. Have you ever worked as a sailor on lumber schooners?

A. Yes, sir.

Q. Have you ever worked cargo under those circumstances that I have described?

A. Yes.

Mr. Street: All right. What is your objection now?

Mr. Duncan: Well, unless I make an objection, you probably won't have any.

Mr. Street: All right, you can answer the question, then, Captain. Are there other ways, or is there another way to put the end of the cargo——

A. There are several other ways.

Q. Will you describe some of them, please?

A. Whenever——

Q. Oh, assume further, Captain, that the load that you are going to take out is 36 inches high?

[fol. 84] A. 36?

Q. Yes.

Mr. Duncan:

Q. And assume further there are two men working?

Mr. Street: Yes.

Q. Whenever the gear forward or aft leads away from the load we always take the opposite gear that leads towards the load to lift with.

Mr. Street:

Q. Now, what do you do, Captain, with the sling that is already attached?

A. Which one of the two?

Q. The pick-up sling now. How do you get rid of that? How do you get the other gear on there?

A. You can hook it right into the same gear, if you want to, in the shackle and lift with the after, and still have the forward gear at the same time.

Q. Now, under those circumstances, is it possible to block up the end of the load that is raised and then lower away on your winch and take that sling off?

A. Yes sir.

Q. And after you have done that is it possible to push that sling under further?

A. Yes sir.

Q. Now, if you do that, Captain, isn't it possible then to stand in front of that load and loop the end around?

[fol. 85] Mr. Duncan: Now, just a minute. I think these questions are quite leading and suggestive.

Mr. Street: Well, of course. He is an expert.

Mr. Duncan: That doesn't make any difference, I don't think.

The Court: I will allow the question. Read it.

(Question read.)

Mr. Street:

Q. What is the answer to that question?

A. Yes.

Q. He can do that?

A. Yes.

Q. And in doing so, Captain, does he have to step near the edge of the lumber underneath his feet?

A. No sir.

Q. Now, are there any other ways to get that sling around there?

A. Yes, there are several ways that is used at different times.

Q. Can you use the pick-up hook?

The Court: Do you mean under the same conditions?

Mr. Street: Yes, under these same conditions. Could you use the pick-up hook in this situation?

A. Yes.

Q. Well, now, remember you have got the timbers right up here (indicating)?

[fol. 86] A. Yes.

Q. How are they going to get any room in there to put that hook underneath there?

A. From the timbers—between the timbers and the load?

Q. Yes. Can they move that load out?

A. Yes.

Q. And what do they use to do that?

A. The man working tells the winch drivers to move the loads away from the timbers with the gear that he is working with; and he will swing the load out from the timbers in that position that the man can step right inside, if he wants to. Or then he lays over the load and sticks the sling under,

and the other man sticks the hook underneath and pulls it through.

Q. Captain, is it possible to slip the loop of the cargo sling under from the inside of the sling load and then reach over and get it on the outside?

A. Yes sir.

Q. Now, could that be done with a load that was 36 inches high, under the circumstances that I have described to you?

A. Yes sir.

* * * * * * * *

Cross-examination.

Mr. Duncan:

Q. Now, what did you testify to, Captain, that you told Spencer about sticking this sling?

[fol. 87] A. I told him not to go inside on the load.

Q. Told him not to go inside——

A. Yes——

Q. On the load?

A. Yes.

Q. Now, when did you tell him that, right after 8 o'clock?

A. Somewheres about—probably fifteen or twenty minutes after eight.

* * * * * * * *

Mr. Duncan:

Q. Now, what did you say to Spencer?

A. I told him not to go inside when he was moving the big sling around the load.

Q. Told him not to go inside?

A. Inside towards the hatch.

Q. Oh, towards the hatch?

A. Yes.

Q. When he was what?

A. Passing the big sling around.

Q. Passing the big sling around?

A. Yes.

Q. Around which way?

A. He had the pick-up sling from this end of the load. If I can show it to the jury?

Q. Well, just describe it in words.

[fol. 88] A. Well, he had the load in this position (indicating).

Q. Now, just a minute. Just describe it in words, will you please?

Mr. Street: Well, lead him, Mr. Duncan.

Mr. Duncan: Just describe it in the best words you can.

A. One end of the load was lifted up with the small sling.

Q. This end near the top of the timber?

A. This load we are talking about now was lifted with the pick-up sling.

Q. At which end?

A. Towards the forward with the forward gear.

Q. And was that a sling load that was right next to the forward tank, or was it one removed back?

A. It was next to the forward tank.

Q. Right up next to the forward tank?

A. Yes sir.

Q. All right, it was the one next to the forward tank at the top of this lumber that was placed in there between the timbers and the hold?

A. Yes sir.

Q. And the hold was open, was it?

A. Yes sir.

Q. Now, just what did you tell him?

A. I told him not to go on the inside.

Q. Told him not to go on the inside?

A. Yes.

[fol. 89] Q. And then what else did you say?

A. I told him it wasn't necessary to go inside of the hold to sling it.

Q. You told him it wasn't necessary to go inside of the load to sling it?

A. Yes sir.

Q. Now, what else did you say?

A. That is all I told him.

Q. That is all you told him?

A. Yes, and I showed him also that it wasn't necessary.

* * * * * * *

Mr. Duncan:

Q. Now, as I understand you, you told Spencer not to put the sling in from the inside edge, is that it?

A. Not to step inside of the load.
Q. Not to step inside——
A. Of the load.
Q. Of the load. Do you mean between the load and the hatch coaming?
A. Yes.
Q. Well, was there any place for him to step there?
A. Yes, there was. As he lifted the load up he tried to step on the very same piece——
Q. Will you keep your seat, Captain, please?
A. Yes. That is the inside. (Indicating)

Mr. Street: Let him illustrate what he means by inside. [fol. 90] You are evidently confused.

The Court:

Q. What does inside mean?
A. Towards the hatch.
Q. Between the hatch and what?
A. The very place where he lifted the load up from. He was trying to step on the very board. The load was over this board, and he tried to step on the same board.

* * * * * * *

[fol. 91] WILLIAM VARTNAW, called as a witness on behalf of the defendant, and having been first duly sworn, testified as follows:

Route 3, Box 185, Petaluma, California.

Direct examination.

Mr. Street:

Q. Mr. Vartnaw, were you ever employed on the steamer Fort Bragg?
A. Yes, I was.
Q. When were you on the Fort Bragg?
A. I was there from May 15th, 1930, until September 4th, 1932.
Q. What position did you have on the ship?
A. Chief mate.

Q. What were your duties on the Fort Bragg as Chief Mate?

A. Looking after discharging and unloading of the ship, and hiring the crew and discharging the crew.

* * * * * * *

Mr. Street:

Q. Now, Mr. Vartnaw, did you have charge—I will ask you first who had charge of loading the lumber on that ship?

A. I did.

Q. Did you make any notes at the time of what kind of lumber it was and where it was stowed?

[fol. 92] A. Yes, I did.

Q. Have you got those with you?

A. Yes, I have.

Q. Will you please take them out? (Witness produces documents.)

Q. Now, I will ask you where did the Fort Bragg go first up North?

A. Loading lumber.

Q. Yes.

A. Westport.

Q. What kind of lumber did you load there?

A. We load lath and shingles.

Q. And where did you put them?

A. We load 6,019 bundles of laths, about 2,000 bundles of shingles. Some of that laths was down in the hold and some on deck, and some shingles in the hold and some on deck.

Q. Now, Mr. Vartnaw, with reference to the port side of the ship, how high up were the laths piled on the deck?

A. They were just about even with the rail.

Q. And how high is the rail?

A. The rail is about 3½ or 4 feet.

Mr. Duncan: Which part of the deck on the port side are you referring to?

Mr. Street: I will come to that in just a minute.

Q. Mr. Vartnaw, I show you here—will you come up here, Mr. Duncan? I show you here what purports to be a diagram of the deck space between the forward tank and the [fol. 93] after tank, and which also shows the hatch and the rail?

A. Yes.

Q. Now, does this diagram here represent—without reference now to these figures that are on there—we don't care much about that now—but does this diagram here represent the situation around the hatch and between the tanks?

A. Yes, that looks like it.

Q. This is the way, then, that the——

A. Looking forward?

Q. Yes. Now, Captain, which side would the port side be on?

A. On the left hand side, this side. (Indicating.)

Q. Will you put a "P" there just out here on the margin? And on the other side would be the starboard side?

A. Yes, that would be the starboard side.

Q. I see. Now, Mr. Vartnaw, will you—if you will notice here the forward plank on this diagram comes out outboard on the port side and outboard on the starboard side further than the edge of the hatch?

A. Yes.

Q. Is that the way it was on the Fort Bragg?

A. It was.

Q. Now, with reference to this space between the rail on the port side and the edge of the hatch on the port side, were there any laths stored in there?

[fol. 94] A. Yes, this was all stowed——

Q. Now, you say this?

A. Yes.

Q. Will you draw an X on that diagram to show where the laths were?

A. All over right from forward to aft all along even with the rail. These little holes in between the tank were full of laths, too.

Q. Now, just fill in with a pencil there where those laths were. Just scribble on there and show where they were stowed?

A. They started right from there (indicating).

Q. You are indicating a point up there. Will you please mark that A. (Witness marks on diagram.) And all the way down here right up to this tank here. There was a tank off there, a little tank, and then between the tanks. (Indicating.)

Mr. Duncan: That is not on the diagram.

Mr. Street: Yes, here is the tank.

A. There was many tanks. We have seven tanks there, I think.

Mr. Duncan: Do you mean there is a tank that isn't shown on the diagram.

Mr. Street: Yes, there are tanks after the house.

A. It is all full of laths here, and in between here (indicating).

[fol. 95] Q. All right. Now, Mr. Vartnaw, you have testified that the laths were stowed on the port side. Now, Mr. Vartnaw, you have indicated that the laths were stowed on the port side from a point a little bit forward of the forward tank all over the deck back to the after part of the after tank?

A. Yes, and also between the tanks.

Q. And in between the tanks. Now, on the port side, were those laths stowed clear up to the hatch coaming?

A. Yes, even above the hatch coaming about 8 inches.

Q. I see. Now, to the best of your recollection, how high was the hatch coaming?

A. The hatch coaming is about 2 feet and a half.

Q. And the bundle of laths was up above that?

A. Yes, even with the rail.

Q. And did you stand there all the time and watch these men put that lath in there?

A. The second mate does, and I do, too. I gave my orders to him, and he is there all the time watching them, but I attend to on the dock and aboard ship.

Q. Did you say at Westport that these laths that you say were 6,000 were put on the deck?

A. Part—half of them was on the deck and half in the hold.

Q. But you saw yourself before you left Westport that they were stowed on the port side on the deck between the [fol. 96] rail and up to the coaming?

A. Yes, sir.

Q. And about a foot above the coaming, you say?

A. About a foot above the coaming, yes.

Q. I see. Now, what else did you load at Westport besides laths? Did you say shingles?

A. Yes.

Q. Do you know where those were stowed?

A. They was also put—some down in the hold and some on deck. Less on deck.

* * * * * * *

Mr. Street:

Q. Now, did you load anything else at Westport?
A. No.
Q. That is all you loaded at Westport?
A. Yes.
Q. Then where did you go?
A. Then we went to Clark & Wilson's Mill at Lynton.

Mr. Duncan:

Q. Lynton?
A. Oregon.

Mr. Street:

Q. Is Westport on the Columbia River?
A. Yes.
Q. And so is Lynton?
A. So is Lynton.
Q. Then you went up to *to* Lynton?
[fol. 97] A. Yes.
Q. Did you load lumber at Lynton?
A. Yes, 15,000 feet of flooring.
Q. And where did you put that?
A. Down in the hold aft, in the aft end of the ship.
Q. What else did you load there?
A. Nothing.
Q. Just the flooring?
A. Yes.
Q. After you left Lynton where did you go?
A. Then we went to Inman and Paulson's Mill.
Q. Did you take anything on there?
A. Yes.
Q. What did you take on there?
A. We took some kiln dried lumber, 25,000.
Q. Where did you put it?
A. In the hold forward. Then we took some rustic and put that in the hold forward, and we took some flooring and put that in the hold.

Mr. Duncan: Now, just a minute. We are not concerned with this.

Mr. Street: If you will let me go, we can get through sooner.

The Court: Oh, let him finish. Go on.

A. And some studding, 3,000 feet. That went in the hold forward, and also some timbers on the deck.

[fol. 98] Mr. Street:

Q. Some timbers on the deck?

A. Yes.

Q. Do you remember where the timbers were stowed?

A. Yes.

Q. Where were they stowed?

A. On deck alongside the tanks.

Q. Where did you go from Paulson's?

A. Then we went and load freight and finish up loading freight in Mercy Dock, Portland.

Q. Where did you go from Mercy Dock?

A. Then we sailed for Coos Bay.

Q. Now, as I get the picture, when you get to Coos Bay you have got the heavy timbers. Do you remember how many there were?

A. 100 pieces.

Q. More than 100?

A. 100.

Q. Oh, 100?

A. Yes.

Q. When you get to Coos Bay you have lath all over the deck of the ship on the port side up as high as the rail, and over to the coaming and about a foot above the coaming?

A. Yes.

Q. And on top of that, then, you have these timbers going up?

[fol. 99] A. Yes.

Q. And those timbers—did you say—were loaded up against the tanks?

A. Yes.

Q. And where were the timbers with reference to the outboard?

A. Right even with the rail. It go right from the rail straight up.

Q. And on top of the rail?

A. On top of the rail, yes.

Q. Now, when you got to Westport, what kind of lumber did you put on?

A. Coos Bay?

Q. Yes, pardon me. When you got to Coos Bay what kind of lumber did you put on, if any?

A. We took three orders of lumber there. First we took in 1 by 12. There was 21,000 on deck amidships.

Q. Yes.

A. And then we took one order of 2 by 3's, that was 15,000, and that went on deck on top of the timbers, and then we took an order of 2 by 3's and 1 by 12's mixed, 25,000, and that went on top of all of it. That is all.

Q. Now, Mr. Vartnaw—I wonder if we could have the other blackboard, your Honor?

The Court: Surely.

Mr. Street: Well, I will try to get along without it. It takes time.

[fol. 100] Q. Mr. Vartnaw, will you—first, when you started to load the 1 by 12's were the hatches on at Coos Bay?

A. Yes.

Q. They were. And when you loaded the 1 by 12's where did you land them?

A. We first land them on the hatch and then piled them in, into the side of the hatch. We had a space about 3 feet, or a little over 3 feet alongside of the hatch where the timbers can fit in. So we filled that space in with the 1 by 12's. We got that order in amidships.

Q. Will you just describe the manner in which—well, I will withdraw that.

Q. You say the 1 by 12's were landed on top of the hatch?

A. Yes, first.

Q. Then did they break up the loads?

A. Yes.

Q. And then you say they put them in between the coaming and the timbers?

A. Yes.

Q. And on top of the laths?

A. Yes.

Q. And did they stow them in there by hand?

A. Yes. First—well, we was low enough we could reach it by hand.

* * * * * * *

[fol. 101] Mr. Street:

Q. Did they put lath in there?
A. Between the lumber, yes.
Q. And how often did they put it in?
A. Every foot.
Q. About every foot?
A. Yes.

Q. And how high up above the top of the coaming—or above the top of the lath here did they stow that lumber by hand?

A. As high as we could conveniently reach, about 4 or 5 feet.

Q. So that in here you had all hand stowed lumber, did you?
A. Yes.
Q. All right. That is all of the hand stowed lumber.

(Marks on diagram.)

Q. Now, then, did you—now, where were the 2 by 3's landed?

A. 2 by 3's was stowed on top of the timbers.

Q. On top here (indicating)?
A. Yes.
Q. They were up there?
A. Yes.

Q. Now, then, did you land any loads of 1 by 12's without stowing them?

[fol. 102] A. Yes, we did.

Q. Where did you land those?
A. On top of those stowed 1 by 12's.

Q. And do you remember how many you put up there, just if you remember?

A. Two or three loads high. I don't remember just how high.

Q. You don't remember?
A. Two or three loads.

* * * * * * *

Mr. Street:

Q. Going to the scene of the accident, will you please tell the Court and jury where you were at the time Mr. Spencer fell?

A. I had just stepped over the rail on the starboard side at the moment when I seen Mr. Spencer fell.

Q. You say you saw him fall?

A. I saw him fall, yes.

The Court:

Q. Saw him fall, or while he was falling?

A. I seen him falling.

Q. Where was he when you saw him?

A. He was going down, just abreast of the hatch, and I stepped on board.

Q. You didn't see him on top of the lumber when he fell?

A. I didn't see him on top, no.

[fol. 103] Mr. Duncan:

Q. Where were you?

A. I just stepped over the rail. I was on the dock, and there was something there, and I was waiting for a load. I was loading the trucks on the dock. We load the trucks with our gear, and there was loads coming, so I stepped on board the ship just at the time he fell.

. . . . . .

Mr. Street:

Q. Now, you say you came aboard and were on the starboard side, and you saw Spencer falling. Was there anything going down in the hold with him?

Mr. Duncan: Just a minute. If he can see.

Mr. Street: Yes, I am asking him.

A. Yes, I seen a board, 1 by 12, going with him.

Q. How many?

A. One.

Q. Just one 1 by 12?

A. That is all I noticed.

Q. And what did you do after he fell in the hold?

A. I went down in the hold, too, to see if he was injured.

Q. Was there any loose lumber lying around in the hold?
A. Yes, that board that fell down.
Q. Just that one?
A. Yes.
[fol. 104] Q. Mr. Vartnaw, where had you been when you first went over to Vallejo—just a minute. Off the record.

(Discussion.)

Q. When the ship got down from up North, where did it go first?
A. Go to San Francisco, Pier 24.
Q. Where did it go from San Francisco?
A. We went to Vallejo.
Q. Now, on Monday morning the hatches were open or closed?
A. They were open.
Q. And was any—had that lumber which you said was in the hold, had it been taken out yet?
A. No.
Q. It was still in the hold?
A. Yes.
Q. Did you know when it was going to be taken out?
A. No, we didn't know that in advance.
Q. You don't know it in advance?
A. No.
Q. Mr. Vartnaw, is it the custom in lumber schooners that carry mixed lumber and cargo to leave their hatches open when they have cargo in the hold and a deck load of lumber on the deck? When they don't know where or when the—when they don't know when the cargo in the hold is going out?

Mr. Duncan: Just a minute.
[fol. 105] Mr. Street: I will withdraw that.

Q. Mr. Vartnaw, when a lumber schooner, such as the Fort Bragg—and I am referring now to the lumber schooners that carry lumber on deck and lumber in the hold, and also have cargo in the hold—is it the custom on that kind of a ship when they are in port with their gears rigged, and are taking lumber from the deck, and there is other lumber in the hold, that they don't know when it is going to come out, is it the custom, under those conditions, to leave the holds open?

Mr. Duncan: Just a minute. That is objected to on the ground it is immaterial and doesn't come within the circumstances of this case.

The Court: Well, the question is when they have lumber on the deck that they are unloading and they have lumber in the hold that is subject to call at any time the consignee calls for it, is it customary to leave the hatchway open pending the arrival or pending the appearance of the consignee who wishes the lumber delivered from the hold. That is substantially the question, isn't it?

Mr. Duncan: He doesn't say anything about a consignee. He just says when they don't know when the lumber in the hold is going out.

Mr. Street: Assume further that all the lumber on the Fort Bragg in this case was for one consignee.

The Court: Both on the deck and in the hold?

[fol. 106] Mr. Street: Yes. That is the evidence in the case, isn't it?

Mr. Duncan: So far.

Mr. Street: Well, all right.

A. It is not practical, because sometimes——

Q. It is not practical to put the hatches on?

A. To keep the hatches open, because they might want any part of that lumber.

The Court: It is not practical, or it is.

A. It is practical.

Q. It is practical to keep them open?

A. Yes, because they might want any of that lumber from the hold, and when we go hauling ship from Frisco to Vallejo—that is three hours, approximately—we make up all that lumber on the deck in sling loads and also in the hold at this time.

The Court:

Q. When you are in dock and you are not at sea, when you are in dock like you were at Vallejo on this occasion, is it the practice to keep that hold open?

A. Yes. Lots of times we have got the same order of lumber in the hold and on deck, so we keep the hatches open and take the lumber wherever we want.

Q. Were you unloading from the hatch this day?

A. That day we unloaded afternoon.

Q. I say, were you unloading from the hatch?

[fol. 107] A. That afternoon, but not in the morning.

Q. At the time of the accident, I mean?

A. No, we were unloading from the deck.

Q. That morning?

A. Yes.

Mr. Street:

Q. But you didn't know, Mr. Vartnaw, when you were apt to be called upon by the consignee to take that cargo out of the hold?

Mr. Duncan: We object to that as immaterial. The evidence is so far that there is only one consignee. These people were delivering his lumber from the deck, and apparently under the charge of the officers of the vessel, and whether or not they knew when this same consignee might call for some lumber out of the hold, plaintiff submits that is entirely immaterial.

The Court:

Q. Did you have any orders, Mr. Witness, regarding the hold load of lumber that day?

A. We did discharge some that afternoon.

Q. I say, did you have any orders regarding the discharging of that lumber from the Captain or from the consignee on that day? Do you know what the orders were regarding the lumber to be discharged from that ship?

A. We started from the deck first.

Q. What was your intention to do, to unload all the lum-

[fol. 108] ber at Vallejo?

A. Yes. We had some freight to Mare Island.

Q. Some at Vallejo and some at Mare Island?

A. Yes.

Mr. Street:

Q. How long did you unload lumber from the Fort Bragg at Vallejo that day, on Monday?

A. Until the water got high enough that we got out of there to go to Mare Island.

Q. And then you went to Mare Island. And what did you unload at Mare Island?

A. We unload the timbers and some flooring from the hold.

Q. Then did you come back to Vallejo?

A. Yes, then we came back and we discharged some shingles.

The Court:

Q. Was that in the morning?

A. That was afternoon.

Q. But you are speaking of the morning, counsel, aren't you?

Mr. Street: Well, my point is——

The Court: Well, in the morning did you attempt to unload from the hold, or did you have any orders to unload from the hold?

A. No, we didn't.

[fol. 109] Q. But in the afternoon you did unload from the hold?

A. Yes.

Mr. Street: Now, I think there is a question still left unanswered.

Q. You didn't know, did you, Mr. Vartnaw, in the morning when you were going to unload the lumber from the hold?

Mr. Duncan: That is the question we object to.

Mr. Street: I am asking him of his own knowledge.

Mr. Duncan: We object to it.

The Court: Well, I will sustain the objection. He can answer whether he had intention of unloading from the hold that morning, or any orders or intention to fill any such orders.

A. We did not have any orders in the morning, but——

Q. Did you have any intention of unloading?

A. Yes, we had intentions.

Mr. Street:

Q. Who do you get your orders from?

A. From Mr. Harrington, the Vallejo Lumber Company. He tells you if he wants something from the hold.

The Court:

Q. Did you have any orders from Mr. Harrington, or anybody else, to unload from the hold?

A. No.

Q. And you were not unloading from the hold?

A. No.

Q. But you were unloading in the afternoon from the hold?

[fol. 110] A. Yes.

The Court:

Q. Well, if you were unloading from the deck in the morning, but you had contemplated unloading from the hold in the afternoon, was it customary to keep the hatch open?

Mr. Street: That isn't the evidence. He doesn't know what they contemplated.

The Court: He says they unloaded from the hold in the afternoon.

Mr. Street: Yes, but that is a fact. He doesn't know what they intended to do.

The Court: Well, I want to find out, within his knowledge. Did you have any knowledge of the fact that they intended to unload in the afternoon from the hold?

A. No.

Q. Did you have any knowledge?

A. No, I didn't have any knowledge whether we should or not.

Q. When did you get the order to unload from the hold?

A. Whenever they need it.

Q. On that day when did you get the order to unload from the hold?

A. When we came back to Vallejo.

Q. You got the orders from Harrington & Company?

A. Yes.

Q. You were subject to any order that came?

[fol. 111] A. Any time.

Q. If you got an order in the morning to unload from the hold you would do so?

A. Yes.

The Court: Do you hear that, counsel?

Mr. Street: Yes, that is all the evidence I want.

The Court: He has made that plain now.

* * * * * * *

Cross-examination.

Mr. Duncan:

Q. As a matter of fact, Mr. Vartnaw, you have forgotten all about the stowage or the placing of this lumber on the deck load, I mean the details, until you referred to this little book when this case began to be worked up?

A. No, I didn't. That is an exceptional case, because we had those long timbers, and that is a different way of stowing those.

Q. A different way of stowing?

A. Yes.

Q. How do you usually stow them?

A. We usually stow them all at once, but at that time it was long timbers, and we couldn't put them between the tanks, and we had to leave a space for those timbers.

Q. What do you mean that you usually stow them all at once?

A. All the—all over the deck. But at that time we put [fol. 112] the shingles up on the tanks first, leaving about 52 feet for the length of the timbers in between.

* * * * * * *

Mr. Duncan:

Q. Now, how long is that space between the two steel tanks at each end of the hatch?

A. About 45 feet.

* * * * * * *

Mr. Duncan:

Q. Did you put the 1 by 12's a*d*mi-ships before you put any lumber on top of the timbers?

A. Yes, that was the first one that came in. First you want to put that in there to have more room, working on top with the smaller stuff.

Q. And you put 1 by 12's in there?

A. Yes.

Q. You piled those by hand, did you?

A. Piled as high as we could reach from the hatch, and then land the rest.

* * * * * * *

Mr. Duncan:

Q. Now, when you piled those in by hand up a ways, did you put laths every 12 inches?

A. Yes.

* * * * * * *

Redirect examination.

[fol. 113] Mr. Street:

Q. Now, as a matter of fact, isn't it the custom on a great many lumber schooners to carry lumber in what they call package lots?

A. Yes.

Q. In other words, they put the sling loads on the boat, and then they bind them with the lashings, and away they go?

A. Yes.

Q. Without ever hand-stowing them at all?

A. They are doing that right now on many steam schooners.

* * * * * * *

[fol. 114] August Kruse, called as a witness on behalf of the defendant, and having been first duly sworn, testified as follows: Hotel Harbor, San Francisco, California.

Direct examination.

Mr. Street:

Q. Mr. Kruse, what is your occupation?

A. Navigation Officer, Merchant Marine.

Q. Mr. Kruse, have you served as a sailor?

A. Yes, I did.

Q. How long?

A. I have been going twenty years altogether to sea.

Q. How many?

A. Twenty years.

Q. Have you ever served as a sailor or seaman on a lumber schooner?

A. Ten years.

Q. And do you hold any licenses at the present time?
A. As a Chief Mate.
Q. A Chief Mate's papers?
A. Yes sir.
Q. Were you ever an officer on board the Fort Bragg?
A. Yes, I was.
Q. How long were you an officer on the Fort Bragg?
A. Three months.
Q. Were you on the Fort Bragg in May, 1931?
A. Yes, I was.
[fol. 115] Q. Do you remember an accident that happened to Mr. Spencer?
A. I do.
Q. Were you on deck that morning?
A. I was.
Q. Where were you working?
A. I was working in the after gear, the after part of the No. 1 hatch.
Q. And where were you working?
A. Port side.
Q. And on the dock, or where?
A. On the deck.
Q. On the deck. First, I will ask you was there any cargo on the deck?
A. Yes, there was.
Q. What was it?
A. Lumber.
Q. Were there any timbers on the deck?
A. Yes, there was.
Q. And where with relation to the timbers were you working? Were you working on top of the timbers, or at one side of them?
A. I was working more one side of the timbers. I was working more on the lumber.
Q. On the morning—first, do you recall what time of day approximately it was, without having to give any hour, [fol. 116] or anything, can you remember whether it was in the morning or afternoon that Mr. Spencer was hurt?
A. I don't remember exactly. It was around 9 o'clock.
Q. I see. Now, did you go forward at all that morning?
A. I did.
Q. For what?
A. I went forward to get the sling for the lumber.

Q. And when you walked forward did you see Mr. Spencer?

A. I did.

Q. And where was he?

A. He was working on the lumber load that was slinged up, hanging in the cargo hook.

Q. Did you see the kind of lumber he was standing on?

A. 1 by 12's.

Q. And how were they stowed?

Mr. Duncan: At what time?

Mr. Street: At any time he saw him.

The Court: If he knows.

Mr. Street: Yes. How were those 1 by 12 pieces stowed?

Mr. Duncan: Yes, if he knows.

A. Some was stowed and some was landed.

Mr. Street:

Q. What kind of lumber was Mr. Spencer standing on?

Mr. Duncan: If he knows, if he ever observed.

Mr. Street: He is not going to testify to something he didn't know.

[fol. 117] A. The minute I saw him he was standing on 1 by 12's.

Q. And were those 1 by 12's stowed or landed?

A. They were stowed.

Q. Now, what was Mr. Spencer doing at the time you saw him when you walked forward?

A. I saw him taking the lumber sling——

The Court:

Q. Doing what?

A. Picking up the lumber sling.

Mr. Street:

Q. Do you mean the heavy sling, the cargo sling?

A. The heavy sling to put around the load that was hanging in the pick-up sling.

Q. Do you mean the sling load was hanging in the pick-up sling?

A. The load he was figuring to sling up was hanging in the pick-up sling.

Q. What kind of a load was that?

A. 1 by 12's.

Q. And was it stowed lumber?

A. That was a landed load.

Q. That was a landed load?

A. Yes, sir.

Q. Now, Mr. Kruse, were you on the ship when this 1 by 12 was loaded on to the ship?

A. I was.

[fol. 118] Q. What does a landed—what does a sling load look like?

A. Landed load?

Q. Yes, of 1 by 12's?

A. 1 by 12's—you mean difference between stowed and landed loads?

Q. No, I am not paying attention to that now. When the load is——

The Court: Placed in position?

Mr. Street (continuing): —slung on to the ship, how does the load itself look as to dimensions? Is it square on the end?

A. Not quite. One end is more even, and the other uneven.

Q. Now, were the 1 by 12's in the sling loads that were taken on board of this ship all of the same length?

A. No. Some shorter, some longer.

Q. Now, will you describe what you saw Mr. Spencer doing when he walked up forward to get the sling?

A. Yes, I saw him.

Mr. Duncan: I object to that on the ground no further foundation has been laid. Immaterial.

Mr. Street: I think I can connect that up with one question.

Q. How soon after—you didn't stay there, did you?

A. No, I did not. I walked aft again.

[fol. 119] Q. And how soon after you left here—or—well, I will withdraw that.

Q. Did you see Spencer fall?

A. I did.

Q. How long after you left the place where he was working on the sling loads did he fall?

A. A few seconds.

Mr. Street: Now, I think there is a connection.

The Court:

Q. Did you see him fall?
A. Yes, sir.
Q. You saw him fall?
A. I did.

The Court: Proceed.

Mr. Street: Now, will you read the question to which there was an objection?

(Question read.)

Mr. Street:

Q. First, did you see him as you were walking forward or as you were coming back?

A. When I was coming back, I saw him when I went forward and when I came back again.

Q. Now, when you came back again what was he doing?

A. He took the sling to sling——

The Court:

Q. He took what?

[fol. 120] A. The lumber sling, the wire sling.

Mr. Street:

Q. That isn't a pick-up sling?
A. No, that is the slinging-up sling.

The Court:

Q. Slinging-up sling?

Mr. Street:

Q. That is the heavy cargo sling?
A. That is the heavy lumber sling.

The Court:

Q. The second sling?
A. Yes, the second sling.

Mr. Street:

Q. What did he do with it?

A. And passed one end to his partner, and was figuring to walk around——

Mr. Duncan: Just a minute.

Mr. Street:

Q. Mr. Kruse, don't try to testify as to what you think Mr. Spencer was going to do. Just tell the Court what you actually saw him do.

A. That is what I saw him doing, pick up the sling——

The Court:

Q. He passed one end to his partner?

A. Yes, and he was hanging on to one end of the lumber sling.

Q. What do you mean by hanging on? He had it in his [fol. 121] hand, the other end?

A. Yes, your Honor.

Mr. Street:

Q. Which lumber was he hanging on to?

A. He was hanging on to the sling yet. He picked up the sling and passed one end of the sling to his partner.

The Court:

Q. And he was hanging on to the other end, is that it?

A. Yes, your Honor.

Q. Of the sling?

A. Yes, of the sling.

Q. He had it in his hand?

A. Keeping it in his hand, holding it in his hand.

Q. It was in his hand, the other end?

A. Yes sir.

Mr. Street:

Q. Did you say that he had one hand on the lumber?

A. Well, no, not during that time.

Q. Oh, I see. Now, what did you see him do?

A. When he started—he was walking closer to that load to get inside.

The Court:

Q. Walking or working?

A. Walking.

Q. He was walking closer. Go on. He was walking closer to what?

[fol. 122] A. Close to the load that was hanging on the pick-up sling.

Q. He was walking close to the load that was hanging in the pick-up sling, is that what you said, Mr. Witness?

A. Closer to the load.

Q. He was walking closer to the load that was hanging in the pick-up sling?

A. Yes.

Mr. Street:

Q. Where did he go?

A. Just—he was trying to get inside of the load.

Mr. Duncan: Just a minute. We object.

The Court: Don't say he was trying to get.

Mr. Street:

Q. Tell the Court and jury where he actually went, if you actually saw him go any place?

The Court: Just what you saw him do.

A. Inside of that load next to the hatches.

Q. Well, did he go in there?

A. The minute I saw him he was just on the end of the load, half ways inside of the load next to the hatches.

Mr. Street:

Q. Now, was the sling load raised up at that time?

A. The sling load was raised up endways with the pick-up sling.

Q. And where were Mr. Spencer's feet when you saw him?

[fol. 123] Mr. Duncan: If he noticed his feet.

A. He was standing on the stowed lumber what was underneath the load what was hanging in the hook.

Mr. Street:

Q. Now, where had he put his feet, if you saw him put his feet any place?

A. On the lumber what was underneath the load—stowed what was underneath of that load.

Q. But where did he put his feet with relation to the——

Mr. Duncan: Just a minute now. I object to this.

Mr. Street: Yes, I guess that is objectionable.

The Court: It is leading, yes.

Q. Where were his feet, if you saw his feet, at that time—that is a fair question.

Mr. Street:

Q. Where were his feet, if you saw his feet, at that time? Was he standing in the middle——

A. No, on the edge of the stowed lumber, next to the hatches—open hatches.

Q. And was he—were his feet in front of the load or underneath it?

A. Just even with the load.

Q. Now, did you see him do anything else?

A. He was putting that wire sling, lumber sling, underneath that load.

The Court:

[fol. 124] Q. That is the heavy sling, is it?

A. Heavy sling, yes.

Mr. Street:

Q. Did you say anything to him at that time?

A. I told him to be careful.

Q. Now, where were you when you saw him at that time, where were you standing?

A. I was standing on the deck load on top of the timbers that was covered with some lumber yet.

Q. On the timbers?

A. Yes, sir.

Q. Where did you go then?

A. I walked aft.

Q. Back to where you had been working?

A. Back where I was working.

Q. And what did you do then?

A. I just put the sling down, and I turned around to look again how they are making out.

Q. And what did you see?

A. And I saw him falling.

Q. At the time you saw him falling, could you see his feet?

A. No, I just saw his head and——

The Court:

Q. What position was he in when you saw him falling, was he in the air going down?

[fol. 125] A. He was in the hatches already. I happened to see his head and shoulders.

Q. You saw his head and his shoulders as he was decending into the hatch?

A. Disappearing, yes.

Q. You walked up aft, and when you looked again you saw him in the act of falling with his head and shoulders just above the hatch, and he was dropping into the hatch?

A. Yes sir.

Mr. Street:

Q. Did you see any lumber go down with him at all?

A. At the same time I saw one piece of lumber going down with him.

Q. What size was that?

A. 1 by 12's.

Q. Now, then, where did you go after you saw him fall?

A. I just went back there too.

Q. Back where?

A. To the place he was—where the load was hanging on the hook.

Q. Now, did you notice at that time in what position the fall was on the load that they were going to take out? Where was the pick-up sling?

A. The pick-up sling was under the load.

Q. And around the after end, or——

Mr. Duncan: Just a minute now. I think that is lead-
[fol. 126] ing, counsel.

Mr. Street: Well, I am trying to save time here, Mr. Duncan. I realize it is improper.

The Court: Well, don't ask leading questions.

Mr. Street:

Q. Which end of the load was the pick-up sling around?

The Court: Do you mean the strong one?
Mr. Street: No, I don't think that one ever got around, did it?

The Court:

Q. The pick-up sling was around which end of the load?
A. Forward end of the load.

Mr. Street:

Q. And where was the fall?
A. There was two falls, connected together in the chains, and there is a hook, what they call a cargo hook, that is connected together in that hook. There is a hook in it and chains, and two falls from each boom, they are connected into the two chains. They are always hanging down together.
Q. Well, were they on this morning?
A. That cargo hook was hooked into the pick-up sling.

The Court:

Q. At what time do you mean, counsel?

Mr. Street: We are going back now to the—I mean when you went back after the accident?
A. After the accident I went back. The load was hang-
[fol. 127] ing in the hook—the pick-up sling.
Q. And which way——

The Court:

Q. What hook?
A. Cargo hook.
Q. That is the strong hook?
A. That is the strong hook where the falls is connected.

Mr. Street:

Q. Well, is that attached to the falls?
A. The falls is connected in that hook.

The Court:

Q. Well, you say it was hanging in the hook. Do you mean it was in the strong sling, was it?

A. No, the lumber load was hanging——

Q. Was it in the heavy sling?

A. That was a small sling, pick-up sling.

Q. The load was hanging in the hook in the pick-up sling?

A. In the pick-up sling.

Q. And not in the heavy sling?

A. Not in the heavy sling.

Q. The heavy sling had not been placed around it?

A. Not yet.

Mr. Street:

Q. And was that sling load that was hanging there the [fol. 128] same one?

A. The same one.

Q. That Spencer was working on when you went forward?

A. Same one.

Q. Now, which way was the fall attached to the pick-up sling slanting?

A. The falls was leading more aft.

Q. Aft?

A. From the load.

Q. Aft from the load to the tops of the booms?

A. To the tops of the booms.

Q. Did you see Spencer in the hold when you got there?

A. I did.

Q. I will reframe that. When you went forward again where did you stand?

A. I stand on the lumber, on the 1 by 12's.

Q. Well, now, did you stand on top of the timbers?

Mr. Duncan: Just a minute. I object to that as leading.

The Court: Yes, that is a leading question.

Mr. Street: All right, I will withdraw it.

Q. Where were you standing when you looked down and saw Spencer?

A. I was standing on the lumber next to the open hatches.

The Court:

Q. At what time was this counsel?

Mr. Street: After Spencer had fallen in.

[fol. 129] The Court: After he came to the scene?

Mr. Street: Yes.

The Court: He had been a distance away. He had been aft and then came up and turned around and saw him falling, and then you came forward to the point?

A. Yes sir.

Q. Then you were standing at that time where, on the timber?

A. On the lumber.

Q. What lumber, counsel?

Mr. Street: He said the 1 by 12's.

The Court: Which one?

Mr. Street: I will try to get that in the record now.

Q. Where were you with relation to the open hatch?

A. I was next to the open hatch on top of the lumber.

Q. Yes, but were you aft or forward of the tanks, of the forward tanks?

A. I was aft from the forward tanks.

Q. And how far aft were you?

A. I didn't measure it, but it must have been about 10 feet or so.

Q. And do you know how far it was on the Fort Bragg between the forward tank and the forward hatch coaming, that little space in there?

A. That was about 5 feet.

Q. I see. Now, when you looked down and saw Spencer [fol. 130] where was he?

A. He was down in the hold.

Q. And did you see any lumber in the hold with him?

A. I saw one piece of 1 by 12's.

Q. And where was it lying?

A. Just a little foot from him.

* * * * * * *

Cross-examination.

Mr. Duncan:

Q. And Spencer, where was he standing?

A. He was standing on top of the stowed lumber, 1 by 12's.

* * * * * * *

Mr. Duncan:

Q. And his feet were underneath the load that he was taking out, is that so?

A. His feet was on the edge of the stowed lumber what was underneath the load what was hanging in the pick-up sling.

• • • • • • •

Mr. Duncan:

Q. Yes. But when it is piled, why, it is all fitted in, then?

A. Then it is all fitted in. That makes all level and even.

Q. And solid, isn't it?

A. And solid.

[fol. 131] Mr. Duncan:

Q. About what part of the hold was Mr. Spencer working at when you saw him, with reference to whether it was forward or aft or midships?

A. Forward.

Q. He was working forward?

A. The forward part of the hold.

Q. Very far forward?

A. A few feet from the forward hatch coaming.

• • • • • • •

Mr. Duncan:

Q. Now, then, this load that you saw him working on to take out must have been the forward load, then, wasn't it?

A. That was the forward load.

Q. The very first forward load?

A. First forward load.

• • • • • • •

Mr. Duncan:

Q. Well, you either remember or you don't. You don't remember whether there was another sling load between the one you say him working on and the tank?

Mr. Street: At what time Mr. Duncan?

A. At what time?

Mr. Duncan:

Q. At the time—the one you said you saw him working on just before he fell.

[fol. 132] A. That time there wasn't anything there any more.

* * * * * * *

Mr. Duncan:

Q. And how long were you gone—you said you went aft after you saw him putting the pick-up sling under this?

A. Yes.

Q. How long were you gone back aft before Spencer fell?

A. A few seconds.

Q. A few seconds?

A. Yes sir.

* * * * * * *

Mr. Duncan:

Q. Now, how far was it from where Spencer was standing to the top of the hatch coaming?

A. How high from the hatch coaming?

Q. From the top of the hatch coming?

A. That must have been about 4 or 5 feet.

Q. 4 or 5 feet?

A. Yes sir.

Q. Now, you say you saw Spencer going down into the hold?

A. I did.

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[fol. 133] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

INSTRUCTIONS REQUESTED BY THE PLAINTIFF AND GIVEN BY THE COURT AS THE COURT'S INSTRUCTIONS

* * * * * * *

III

The plaintiff alleges in his complaint and has submitted some evidence on said allegations, that he was unloading a deck cargo of lumber and was working on the deck load,

close to the hold or hatch, when the lumber of the deck load, close to the hatch, toppled and precipitated him into the open hold or hatch, causing him injuries. The plaintiff alleges:

First: That his employer in charge of the vessel and in charge of the loading, negligently loaded the vessel with this deck cargo of lumber by negligently landing the lumber on the deck by reason of which it toppled, and plaintiff fell therefrom.

Second: Plaintiff alleges that the defendant negligently failed to secure said landed lumber by blocking or otherwise, to prevent shifting or toppling of the landed lumber.

Third: Plaintiff alleges that the defendant was negligent in leaving the hold open while plaintiff was working in the course of his duties to unload the deck cargo.

In other words, plaintiff alleges that the defendant negligently failed to furnish plaintiff with a reasonably safe place to work.

If you find that defendant did not provide plaintiff with [fol. 134] a reasonably safe place to work, then defendant was guilty of negligence, and plaintiff can recover judgment against defendant, providing you find also that said negligence was the proximate cause of plaintiff's injuries.

* * * * * * *

IX

You are instructed that the lumber on the deck next to an open hold upon which lumber plaintiff was standing when he fell, constituted the place furnished by the defendant employer for the prosecution of further work, and if you find that this lumber was built up on the deck next to an open hold under the orders of the defendant employer, or his agents, that is, the officers of the ship, and if you find that the plaintiff was ordered to work there, and if you find that such place of work as here described was not reasonably safe, you are instructed that it was negligence on the part of the defendant employer to furnish such a place to work, and such negligence, if any you find, is attributable directly to the defendant employer whether he or his officers on the vessel had actual knowledge of the danger or not.

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IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

INSTRUCTIONS GIVEN BY THE COURT OF ITS OWN MOTION

* * * * * * *

XVa

The law says the defendant must furnish a reasonably safe place for a seaman to work, meaning a reasonably safe place to work under all the circumstances of the business. [fol. 135] In order to determine whether defendant provided plaintiff with a reasonably safe place to work you must consider not one condition alone at the time and place, but the whole situation as presented by the evidence at the time of the accident.

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IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

INSTRUCTIONS REQUESTED BY THE DEFENDANT AND GIVEN BY THE COURT AS AMENDED

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II

If you find that the defendant(s) (have) [has] been negligent in some particular in connection with furnishing the plaintiff with a [reasonably] safe place to work, you are not warranted in returning a verdict for the plaintiff unless you find that the act of negligence on the part of the defendant was the cause of the plaintiff['s injury] (falling into the hold of the vessel. Even though the defendant may have been negligent in some particular, such negligence may be disregarded by you unless it caused the plaintiff to fall into the hold.)

(Portion in brackets added by the Court and portion in parenthesis stricken out by the court.)

Given as amended.

E. P. M., J.

* * * * * * *

[fol. 136] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

INSTRUCTIONS REQUESTED BY THE DEFENDANT AND REFUSED BY THE COURT

I

In every kind of work, and particularly in work upon ships, there are certain dangers inherent in the nature of the work itself, and certain other dangers which may arise during the progress of the work. If an employee is injured because of some danger which is ordinarily to be expected in the kind of work he is doing, he cannot recover from his employer, because he assumed the risk of such dangers when he entered the employment of the employer. If the danger or circumstance which causes the injuries to the employee is not an ordinary danger, i. e. is not a danger or circumstance ordinarily to be expected in the performance of the work, but is a danger or circumstance which arises when the work is being carried on in a careless and negligent manner, the employee also assumes the risk of injury from these extraordinary dangers, if they are obvious, apparent and known to him.

When the dangers or circumstances which cause the injuries are not ordinarily incident to the kind of work the employee is doing, he does not assume them unless they are actually known to him, but when the dangers or circumstances which cause the injuries are ordinarily incident to the employee's employment, he is presumed to know of such dangers whether he does or not, if he is a workman of mature years and experience.

[fol. 137] The plaintiff in this case is a seaman, and it is the general rule that seamen do not assume the risks of their employment when they are acting in obedience to orders. This exception in the case of seamen is made by the law because a seaman is ordinarily unable to disobey orders without incurring severe penalties; he is ordinarily liable to forfeit his wages if he quits before his term of employment is over, and he may also forfeit any personal effects he may leave on the ship in case he deserts. A seaman has been likened to a soldier on the field. Ordinarily it is impossible for him to exercise any will of his own without incurring certain penalties prescribed by federal statute.

Ordinarily he may be put in irons if he disobeys a lawful command.

If you find that the plaintiff knew before he commenced work on the morning he was injured, that the deck load of lumber had been landed in slingloads and if you further find that he was acting in obedience to general orders to unload the lumber, you need not consider the question of whether the plaintiff assumed the risk, if, at the time he received the order, he was unable to leave the ship and unable to disobey the command without incurring a penalty or forfeiture of his wages and personal effects, and punishment for disobedience of the order.

I further instruct you, however, that if you find that the Fort Bragg was tied to the dock at Vallejo when the plaintiff was ordered to help unload cargo, then the plaintiff was [fol. 138] not bound to obey such order and was not subject to any penalty or punishment for disobeying it, because such penalties and punishments as are provided by federal statute for disobedience of lawful commands apply only to lawful commands at sea; and if the Fort Bragg was not at sea when the command was given, the federal statute providing for punishment in such cases did not apply to this plaintiff. And I further instruct you that if the Fort Bragg was engaged in the coastwise trade only, it was unnecessary for the plaintiff to sign articles on the ship for any particular voyage, or for any fixed period of time. And if you find that the plaintiff's contract of employment was indefinite and not for any fixed or certain voyage, or that it could be terminated at will by either the plaintiff or the officers of the ship, then I instruct you, as a matter of law, that the plaintiff could leave his ship at any time she was in port without any forfeiture of his personal effects or of his wages earned up to the time he quit the vessel and without being liable to punishment for desertion. The federal statutes which provide for penalties and punishments in cases of desertion do not apply unless the seaman has engaged himself for a certain voyage or for a definite and fixed period of time.

The defendants in this case have interposed the defense that the plaintiff was injured by a risk which he assumed, and whether this defense is available to them or not depends upon your finding of what the status of the plaintiff was [fol. 139] when the command to unload was given. Whether

or not the plaintiff did assume the risk of the danger which caused his injury is a question of fact for you to determine, but you must first decide whether the plaintiff could have disobeyed the command to unload and quit the ship without forfeiture or penalty. You are further instructed, however, that the possibility or certainty of the plaintiff being discharged for refusal to obey an order can, as a matter of law, have no effect upon your conclusions.

Refused.

E. P. M., J.

II

If you find as a fact that the plaintiff assumed the risk of the particular danger which caused his injuries, he cannot recover anything in this action.

Refused.

E. P. M., J.

III

If you find that at the time the plaintiff was ordered to unload lumber from the Fort Bragg, he was a mature and experienced seaman and could have disobeyed the order and quit the ship without any forfeiture or punishment, other than the loss of his job, and if you further find that the injuries he received were caused by a danger which is ordinarily incident to the business of carrying deckloads of lumber on ships when that business is being conducted in a manner as prudent and careful as such a business can be carried on under all the circumstances, you must find that [fol. 140] the plaintiff assumed the risk of such danger and give judgment for the defendants.

Refused.

E. P. M., J.

IV

If you find that at the time the plaintiff was ordered to unload lumber from the Fort Bragg he was a mature and experienced seaman and could have disobeyed the order and quit the ship without forfeiture or punishment of any kind, other than the loss of his job, and if you further find that the defendants were negligent in stowing the deckload of lumber in slingloads on the deck without repiling each piece of lumber by hand, then if you further find that the danger of such slingloads collapsing if the workmen stepped

too close to the edge of the deckload was obvious and known to the plaintiff, you must find that the plaintiff assumed the risk of such danger and give judgment for the defendants.

Refused.

E. P. M., J.

V

If you find that the place in which the plaintiff was working was made unsafe because of changing conditions in the work, you must find that the defendants were not negligent in furnishing the plaintiff with a safe place to work because an employer is not bound to furnish his employees with a safe place to work when the conditions of the working place are constantly changing during the progress of his work.

Refused.

E. P. M., J.

[fol. 141]

VI

You are instructed that it is not negligence for the defendants to have the hatches of the Fort Bragg off while she is in port loading or discharging cargo from her hold.

Refused.

E. P. M., J.

VII

There is no duty on the part of the officers of a ship to stand over a seaman and direct him in the details of his work, and if you find that the plaintiff, in placing the sling wire underneath the slingload of lumber, was acting in response to general orders, I instruct you that the manner in which the sling wire was to be placed underneath the slingload was an act over which the plaintiff had the sole control, and if he chose to perform the act in a dangerous manner, such as stepping too near to the edge of the deckload when there was a safe method of doing the work, involving no risk of the edge of the deckload giving way, then the plaintiff cannot recover in this action.

Refused.

E. P. M., J.

VIII

If you find that the plaintiff, in placing the sling wire underneath the slingload, acted in pursuance to general orders but disregarded specific orders as to the precautions

he should take in doing the work and was injured because he disregarded such specific orders, the plaintiff cannot recover in this action.

Refused.

E. P. M., J.

[fol. 142]

IX

If you find that the plaintiff, on May 4th, 1931, could have disobeyed the order to unload cargo and could have quit the Fort Bragg without incurring any penalty or punishment other than the loss of his job, and if you further find that the work of unloading the lumber was being performed in a negligent and careless manner on May 4th, 1931, but in no different manner than was customary on the Fort Bragg, and if you further find that the plaintiff, prior to May 4th, 1931, knew of the negligent and careless manner of work customarily used on the Fort Bragg in unloading deckloads of lumber, and that he appreciated the risk that was attributable to such customary negligent and careless manner of work, and that he continued in his employment after such knowledge and appreciation, without obtaining from his employer, or his representatives, an assurance that the fault would be remedied, then I instruct you that the plaintiff assumed the risk resulting from such a manner of work, even though the risk arose out of the defendants' breach of duty.

Refused.

E. P. M., J.

X

If you find that the progress of the work the plaintiff was performing at the time of his injury was necessarily and constantly changing the physical condition of his place of work and that the cause of his fall into the hold was a condition created by said constant and continuous change in [fol. 143] the working place, then I instruct you that under such circumstances the employer, George S. Beadle, was not bound to furnish the plaintiff with a reasonably safe place to work at the time of the injury.

Refused.

E. P. M., J.

XI

If you find that the plaintiff in this action was of the class of seamen who are not subject to penalties or forfeiture for disobedience of orders, and that the ship was tied to the dock at Vallejo at the time of the injury, and that the plaintiff knew, or could, as an experienced seaman be deemed to know, the condition of the lumber beneath his feet and was upon notice of its actual condition, and if you find that he fell into the hold because he was pursuing a method of passing the loop of the heavy sling underneath the end of the slingload of lumber he and his partner were about to take out, and if you find that he could have performed this work in a safe manner not involving any risk of falling into the hold, then I instruct you that the plaintiff cannot recover in this action.

Refused.

E. P. M., J.

* * * * * * *

XIV

There can be but one proximate cause of an injury, and you are instructed that under the circumstances of this case the fact that the hatches were off at the time the plaintiff fell cannot be and is not the proximate cause of the [fol. 144] plaintiff's injuries.

Refused.

E. P. M., J.

XV

If you find as a fact that the plaintiff was standing on a slingload of lumber when he fell into the hold, and if you find that the plaintiff knew that slingloads furnished an insecure working place and knew that before he fell that he was standing upon such a slingload and as an experienced seaman appreciated the risk of working there, then the plaintiff assumed the risk of working in such a place and he cannot recover in this action.

Refused.

E. P. M., J.

XVI

You are instructed that it was not negligence as a matter of law for the defendant to carry lumber on the Fort Bragg in slingloads, and that if such a method of carrying lumber was sometimes followed on lumber schooners of the general type of the Fort Bragg, then the risk of working upon such a slingload was an ordinary risk of the plaintiff's employment as a seaman on a lumber schooner and any such risk was assumed by the plaintiff when he entered the employment and he cannot recover in this action.

Refused.

E. P. M., J.

XVII

If you find that the lumber on which the plaintiff was standing when he fell was hand stowed lumber, the plaintiff [fol. 145] cannot recover in this action.

Refused.

E. P. M., J.

* * * * * * *

XIX

If you find that the plaintiff helped remove the hatches on the Fort Bragg and knew that the hatches were off at the time he commenced work on Monday morning, May 4th, and that the absence of the hatch covers was obvious and apparent to him, then I instruct you that the plaintiff assumed the risk of any injury caused by the absence of such hatch covers.

Refused.

E. P. M., J.

XX

If you find as a fact that one of the boards in the deckload at the edge of the deckload turned under the plaintiff's foot when he stepped on it, and that this chain of circumstances caused him to fall into the hold, the plaintiff cannot recover in this action.

Refused.

E. P. M., J.

[fol. 146] In District Court of Appeal of the State of California, First Appellate District, Division One

1 Civil No. 9190

Opinion—Filed Dec. 28, 1934

Plaintiff, a seaman employed on the "Fort Bragg," a coastwise vessel, was injured aboard the ship while unloading part of a deckload of timber at Vallejo, California. He brought this action for damages against both defendants under the terms of the Jones Act (46 U. S. C. A. Sec. 688). At the trial a non-suit was granted as to the defendant Beadle Steamship Company, Ltd., a corporation, from which no appeal was taken, and it is consequently eliminated from the case. The jury returned a verdict against the defendant George S. Beadle for $10,000.00. Which the trial court reduced to $7,000.00 on motion for a new trial, and said defendant has appealed from the judgment.

The Amended Complaint alleged that respondent suffered numerous injuries of a serious nature through the negligence of appellant in failing to provide respondent with a reasonably safe place to work. The particulars in which appellant failed in this duty are alleged to be in piling slingloads of lumber on the deck next to the open hold of the vessel without piling or properly securing the lumber, and failing to provide safeguards around the open hold; that as a result of this negligence certain lumber gave way under respondent as he was attempting to fasten a loading sling under a slingload of this lumber precipi- [fol. 147] tating him into the hold, causing the injuries complained of. The Answer denied negligence, and set up as affirmative defenses, assumption of the risk by respondent and what is stated to be contributory negligence. It may be doubted that the plea of contributory negligence is sufficient, but no question is made on that point, and in any event under the Jones Act contributory negligence is not a defense, but may be considered only in mitigation of damages.

At the outset it may be well to state that we feel that the evidence was sufficient to go to the jury on the question of appellant's negligence, and is sufficient to sustain the verdict on that point.

As heretofore noted, appellant pleaded as an affirmative defense assumption of the risk, and requested the Court to give instructions on that question. This, the Court, however refused to do, apparently on the theory that such defense was not open to appellant in a case of this character. For this error we feel that the judgment must be reversed for the reasons hereinafter set forth.

The Jones Act, by reference, incorporates the Federal Liability Act (45 U. S. C. A. Sec. 51-59). The Federal Liability Act eliminates the doctrine of assumption of the risk as a defense in cases where the employer has violated a statute enacted for the safety of employees; otherwise it remains. 45 U. S. C. A. Sec. 54; Seaboard Air Line Ry. [fol. 148] vs. Horton, 233 U. S. 492; 58 L. Ed. 1062.

The common law doctrine, however, is limited and risks of the employment due to the employer's negligence are not assumed unless the employee becomes aware of the defect or disrepair and of the risk arising from it unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstanes would have observed and appreciated them. Seaboard Air Line Ry. v. Horton, 233 U. S. 492; 58 L. Ed. 1062; Southern Railway Co. v. Hermans, 44 Fed. (2d) 366.

The Horton case, it is true, was a railroad case under the Federal Liability Act, but that act is a part of the Jones Act as we have already seen. The Hermans case was, however, a case brought under the Jones Act, and the issue there was whether the employer had provided the employee with a reasonably safe place to work. It may be noted that in construing these statutes, the Federal Liability Act and the Jones Act, the state courts are required to adopt the construction placed on them by the federal courts. Pryor v. Williams, 254 U. S. 43; 65 L. Ed. 120.

We are therefore satisfied that the doctrine of assumption of the risk is applicable in a limited manner to cases of injuries to seamen when the action is brought under the Jones Act in the state courts, and it remains only to be seen if there was any evidence in the case to justify instructing the jury on that issue.

The ship's hold was open, which fact was admittedly [fol. 149] known to appellant; the lumber on which he was working was so close to the open hold that if he fell he would almost certainly fall down into it, and he also knew

that no safety lines or other safeguards were present to prevent him falling into the hold should he slip from his place of work. There was evidence also that he knew that the lumber he was working on was landed in slingloads and not piled, and was not as secure as piled lumber. There was also some evidence, although contradicted that respondent disobeyed specific orders in doing his work in the manner he was pursuing at the time of his injury. Respondent was an experienced seaman, who had made other voyages on the Fort Bragg and other lumber vessels. Under such circumstances appellant was entitled to have the jury instructed on the theory of assumption of the risk, and the court's refusal to do so was reversible error. Pryor v. Williams, supra; Southern Railway Co. v. Hermans, supra; Holy Cross Gold Min. Co. et al., v. O'Sullivan, 27 Colo. 237, 60 Pac. 570.

Respondent cites the following cases from California claiming that assumption of the risk does not apply. They are Anderson v. Matson Nav. Co., 125 C. A. 447; Lejeune v. General Petroleum Corporation, 128 C. A. 404; and McGeorge v. Chas. Nelson Co., 107 C. A. 148. In the first two cases the injury resulted from the negligence of a fellow servant, which defense is excluded under the Federal Liability Act, Chicago R. I. & P. Co. v. Ward, 252 U. S. 18; 64 L. Ed. 430.

In the McGeorge case the injured man was an assistant [fol. 150] engineer who had been ordered to adjust a bolt using a cold chisel, while a fellow employee struck the end with a heavy hammer. After several strokes the hammer missed the bolt and struck the plaintiff in the head and face. Clearly this was negligence of a fellow servant, and also there was the failure of the employer to furnish proper appliances, since there was evidence that there was on the vessel, which was at sea, no wrench of the proper size to turn the bolt. The Court recognizes that under proper circumstances the doctrine of assumption of the risk applies to seamen but not under the particular facts. Furthermore, the instructions given were too broad. We are of the opinion that that case is clearly distinguishable under the facts.

Many other errors are claimed by the appellant, but as they are not apt to occur on another trial, it is not necessary to refer to them. In passing, we may say that Instruction No. IX is erroneous in using the words "built

up"; as one of the issues was whether respondent had slipped on lumber that had not been piled, or lumber that had been piled as respondent claimed it should have been, and the quoted words are general enough to include both types.

For the reasons given the judgment must be and is reversed.

Thomas D. Johnston, Justice Pro Tem.

We concur: Tyler, P. J. Cashin, J.

[fol. 151] IN SUPREME COURT OF CALIFORNIA

In Bank

S. F. No. 15,384

OPINION—Filed Sep. 3, 1935

The plaintiff brought this action under the provisions of section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. sec. 688), called the Jones Act, against Beadle Steamship Co., Ltd., and George S. Beadle, for damages for personal injuries sustained when he fell through an open hold of the steamer Fort Bragg. A judgment of nonsuit was entered as to the steamship company. The jury returned a verdict for the plaintiff in the sum of $10,000 which, on denying the motion for a new trial, the court reduced to $7,000. From the judgment entered on the verdict the defendant, George S. Beadle, has appealed.

The main contention on the appeal is that the court erred prejudicially in refusing to instruct the jury on the question of assumption of risk. The Fort Bragg was a single-ended vessel engaged in the coastwise trade. The plaintiff was employed as a seaman on the vessel. On the particular voyage in question timbers 52 feet long were piled lengthwise of the deck, on the port and starboard sides, to a height of about ten feet above the deck. Between this lumber and the hatchcoamings there was a space about forty inches wide, and about forty-five feet in length, the forty-[fol. 152] five feet being the distance between two large tanks fore and aft of the hatch. At Coos Bay a quantity of

1 x 12's and 2 x 3's was loaded into the spaces so left on the port and starboard sides of the hatch and between the two tanks, up to the top of the long timbers. No space was left between the load and the hatch coamings.

When the ship docked at Vallejo to take off cargo the plaintiff was ordered to assist in unloading the lumber piled between the large timbers and tanks and the hatch coamings. While this lumber was being unloaded the hatch covers were off. The plaintiff and another were preparing a load of lumber to be swung ashore, about six or eight feet above the hatch coamings. While the plaintiff was attempting to place a cargo sling around a sling load of lumber, he fell into the hold, a distance of about eighteen feet, and was seriously injured.

The plaintiff alleged the defendant's negligence in the manner of loading the lumber between the long timbers and the hatch coamings, and the negligent failure of the defendants in furnishing to the plaintiff a reasonably safe place to work. The defendants pleaded affirmatively assumption of risk and contributory negligence.

The trial court refused to give the instructions requested by the defendant on the question of assumption of risk. The question is whether under the facts this defense was available to the defendant and the failure to instruct the jury thereon constituted prejudicial error.

[fol. 153] It is contended that the plaintiff, an experienced seaman, assumed any risk incident to the work of unloading under the circumstances involved. The Jones Act incorporates by reference the provisions of the Federal Employers Liability Act (45 U. S. C. A. sec. 54.). By the provisions of the latter act the defense of assumption of risk, if applicable under the facts, is a bar to recovery. The appellant contends that if that defense is not available in the case of a seaman suing under the Jones Act, nevertheless the plaintiff is not a seaman but is rather in the class of longshoremen and stevedores who live on shore and are not subject to the discipline of the ship and may quit at will. This argument is predicated on the showing that the vessel was engaged only in the coastwise trade, and was never any great distance from a port, and that the plaintiff was not under any necessity of subjecting himself to unsafe employment, but could quit at will. The cases relied upon by the defendant, however, do not indicate that the mere engagement in

coastwise trade alone is sufficient to create the exception. In such cases as Skolar v. Lehigh Valley R. Co., 60 Fed. (2d) 893, The Scandinavia, 156 Fed. 403, (see also Scheffler v. Moran Towing & Trans. Co., 68 Fed. (2d) 11), the plaintiff lived on shore and otherwise was not strictly a seaman subject to orders and discipline as such. We think the rule of those cases was not intended to be extended to the case of a seaman simply because he was employed on a vessel which touched ports frequently.

[fol. 154] We may assume that the plaintiff, as is stated in some cases (Chamberlin & Co. v. Rylander, 68 Fed. (2d) 362; Scheffler v. Moran Towing & Trans. Co., supra; States S. S. Co. vs. Berglann, 41 Fed. (2d) 456), assumed the risks ordinarily incident to the employment. One of the principal issues upon which evidence was introduced in this case was whether the plaintiff was furnished a reasonably safe place to work while unloading the lumber next to the hatch coamings. The accident occurred at nine o'clock on the morning of May 4, 1931. The hatch covers had been taken off the night before. There was undisputed evidence that the lumber, at least from a distance of about four feet from the deck, had been "landed" rather than stowed, that is, placed in sling-loads just as it came from the dock, rather than hand piled piece by piece with laths at stated distances to make a solid packing, and that a portion of the landed lumber toppled with the plaintiff causing him to fall into the hold. It further appeared that a request had been made to replace the hatch covers, but that the plaintiff was ordered to work with the hatch uncovered. It was undisputed that there was no necessity for the hatch to be open, as no unloading from the hold was being done that morning. There was also evidence that it was unusual to load the deck so close to the hatch.

The question is not whether the plaintiff properly handled the slingload which he was preparing to be lifted off. That question is rather one of contributory negligence, (see [fol. 155] Seaboard Air Line v. Horton, 233 U. S. 492, 503; McMyler Mfg. Co. vs. Mehnke, 209 F. Ed. 5; Devaney v. Atchison etc. R. Co., 86 Cal. Dec. 645; Engfors v. Nelson S. S. Co., 280 Pac. 337; Barker v. Kansas City, M. & O. Ry. Co., 88 Kan. 767, 129 Pac. 1151), and is not otherwise involved in a consideration of the matter before us. The important issue was whether the plaintiff was furnished a rea-

sonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such a reasonably safe place. The question was submitted to the jury on that basis, and we see no prejudicial error in the refusal of the court specifically to instruct the jury as to whether the plaintiff had assumed the risk. The effect of the instructions as given was to place liability on the defendant only if a reasonably safe place was not provided, and there was negligence in failing to make such provision.

It has become well-recognized, both before and since the incorporation into the Jones Act of the Federal Employers Liability Act, that the entire doctrine of assumption of risk is not applicable to seamen. The reasons underlying this policy are stated in the cases recognizing the exception. (Lafourche Packet Co. vs. Henderson, 94 Fed. 871; The Colusa, 248 Fed. 21; Cricket S. S. Co. vs. Parry, 263 Fed. 523; Ziegler v. Alaska Portland Packers' Assn., 296 Pac. 38; LeJeune v. General Pet. Corp., 128 Cal. App. 404; 56 Corp. Jur. 1198, et seq.; McGeorge v. Charles Nelson Co., 107 Cal. [fol. 156] App. 148.) It is also well settled that under the federal statu-es an employee does not assume the risk of the defendant's negligent failure to provide a safe place to work. (Seaboard Air Line v. Horton, supra; States S. S. Co. vs. Berglann, supra; Ziegler v. Alaska Portland Packers Assn., supra; The Kongosan Maru, 282 Fed, 666; Engfors v. Nelson S. S. Co., supra.) The rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him. (Cincinnati, M. O. & T. P. Ry. Co. v. Hall, 243 Fed. 76, 81). The reliance upon the statement in The Gladiolus, 21 Fed. 417, that leaving open a common between-deck hatchway while the vessel is lying in port is not presumptive evidence of negligence, is insufficient to require a rever-al of the judgment in the present case. There was no contention made in this case that merely leaving the hatch open constituted negligence. There is involved the additional element of the negligence of the defendant in furnishing to the plaintiff an unsafe place to work. The record supplies sufficient evidence to go to the jury on that issue and to support its implied finding thereon. Upon the record presented the submission to the jury of the instructions requested would be the practical equivalent of directing a verdict for the defendant. The facts do not present such a case as, without

question, entitles the defendant to the instructions on the question of assumption of risk, and the withholding of in-
[fol. 157] struction on that question, if error, was not prejudicial to him.

There was no failure to instruct the jury on the defendant's theory of the case. The submission of the case to the jury on the issue considered by it, was as favorable as the defendant could expect under the authorities herein cited.

We have examined the other specifications of error with reference to the refusal to give certain requested instructions and to the admission and exclusion of certain evidence, and find nothing in the rulings of the trial court which would justify a reversal.

The judgment is affirmed.

Shenk, J.

We concur: Curtis, J. Preston, J. Langdon, J. Waste, C. J.

[fol. 158] IN SUPREME COURT OF CALIFORNIA

In Bank

S. F. No. 14384

SPENCER

vs.

BEADLE S. S. Co.

ORDER DENYING PETITION FOR REHEARING—Filed Oct. 3, 1935

By the Court:

The Petition for a rehearing herein is denied.

Waste, Chief Justice.

Dated October 3, 1935.

[fol. 158½] [File endorsement omitted.]

[fol. 159] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

DESIGNATION OF PARTS OF RECORD TO BE CERTIFIED TO THE UNITED STATES SUPREME COUFT AS TRANSCRIPT ON PETITION FOR WRIT OF CERTIORARI—Filed Dec. 9, 1935

To the Clerk of the above-entitled Court:

You will please prepare and certify to the Supreme Court of the United States the hereinafter designated portions of the transcript of record in the above case which the defendant, George S. Beadle, hereby designates as the part of the record necessary for the consideration of his petition for certiorari in the Supreme Court of the United States, to-wit:

Parts of Clerk's Transcript

1. First Amended Complaint in the Superior Court of the State of California, in and for the City and County of [fol. 160] San Francisco;

2. Answer to First Amended Complaint;

3. Verdict;

4. Judgment on Verdict;

5. Stipulation consenting to reduction of the principal amount of Judgment as condition to denial of Motion for New Trial;

6. Order denying Motion for New Trial;

7. Notice of Appeal to the District Court of Appeal, First Appellate District of the State of California;

8. Request for Transcript of record on appeal;

9. Clerk's certificate to Clerk's Transcript;

Parts of Reporter's Transcript

The following portions of the evidence taken and proceedings had in the trial Court:

Plaintiff's Opening Statement:

Commencing at page	Commencing at line	Ending at page	Ending at line
2	14	2	20
6	25	7	6

Alfred Spencer:

	Commencing at page	Commencing at line	Ending at page	Ending at line
	12	15	13	12
	14	14	14	26
	19	19	21	1
	22	25	24	3
	25	5	32	10
	37	26	44	14
	73	3	76	22
	77	6	77	15
	78	5	78	6
	78	25	79	12
[fol. 161]	126	18	126	20
	129	25	130	23
	133	7	133	14
	133	24	134	15
	137	12	143	13
	149	19	149	22
	151	14	151	17
	154	4	154	17
	158	18	160	21
	168	23	168	25
	169	26	170	2
	170	23	170	24
	178	2	178	10
	178	24	179	6
	180	4	180	7
	197	22	198	13
	345	20	345	22
	346	15	347	4
	359	12	359	26
	365	4	365	12
	400	26	401	15
	411	4	411	11
	416	22	417	15

Plaintiff's Opening Statement: (Continued)

Walter Paul:

Commencing at		Ending at	
page	line	page	line
456	22	457	20
458	10	458	13
461	18	461	20
462	2	462	3
477	10	478	15

George S. Beadle:

Commencing at		Ending at	
page	line	page	line
102	20	102	25

John Samuelson:

Commencing at		Ending at	
page	line	page	line
563	15	563	21
563	26	564	5
658	10	659	2
659	16	659	19
662	23	663	7
664	7	664	24
668	9	669	4
671	14	676	22
676	25	677	7
[fol. 162] 681	13	682	26
691	7	691	26

William Vartnaw:

Commencing at		Ending at	
page	line	page	line
564	16	564	23
565	16	569	14
572	25	576	11
577	7	578	2
578	16	579	6
580	10	586	5
599	9	599	24
602	20	602	21
614	13	614	20
617	4	617	5
649	14	649	21

Plaintiff's Opening Statement: (Continued)

August Kruse:

Commencing at page	Commencing at line	Ending at page	Ending at line
694	4	707	5
714	22	714	23
715	14	715	17
719	19	719	22
720	4	720	9
723	18	723	21
724	16	724	23
725	10	725	15
727	14	727	21

10. Instructions requested by the plaintiff and given by the Court as the Court's Instructions:

Instruction No. III, commencing at page 819 line 13 and ending at page 820, line 13;

Instruction No. IX, commencing at page 823, line 24 and ending at page 824, line 11;

11. Instructions given by the Court of its own motion:

Instruction No. XV-a, commencing at page 827 line [fol. 163] 4 and ending at page 827, line 8.

12. Instructions requested by the defendant and given by the Court as amended:

Instruction No. II, commencing at page 837 line 24 and ending at page 838, line 11.

13. Instructions requested by the defendant and refused by the Court:

Instructions Nos. I, II, III, IV, V, VI, VII, VIII, IX, X, and XI, commencing at page 840, line 1 and ending at page 847, line 17;

Instructions Nos. XIV, XV, XVI, and XVII, commencing at page 848, line 9 and ending at page 849, line 16.

Instructions Nos. XIX and XX, commencing at page 850, line 1 and ending at page 850, line 16.

14. Opinion of the District Court of Appeal of the State of California, First Appellate District, Division One, filed December 28, 1934;

15. Opinion of the Supreme Court of the State of California, filed September 3, 1935;

16. Order denying petition for rehearing.

17. This designation of parts of record to be printed.

Dated December 9, 1935.

Harold M. Sawyer, Attorney for Defendant, George S. Beadle, Petitioner in the U. S. Supreme Court for a Writ of Certiorari.

[fol. 164] Receipt of a copy of the within Petitioner's Designation of parts of record to be printed is admitted this 9th day of December, 1935.

A. Don Duncan, Attorney for Plaintiff.

[fols. 165 & 166] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 167] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 234,720

ALFRED SPENCER, Plaintiff and Respondent,

vs.

BEADLE STEAMSHIP COMPANY, LTD., a Corporation, and George S. Beadle, Defendants; George S. Beadle, Defendant and Appellant

Additional Parts of Record to be Inserted in Appellant's Proposed Transcript on Application for Writ of Certiorari to the U. S. Supreme Court, and to be Printed as a Part Thereof

TESTIMONY OF ALFRED SPENCER

Direct examination.

Mr. Duncan:

Q. Now, Mr. Spencer, will you show the scene of this case here, looking through the ship? In other words, draw

roughly the lumber, and the timbers looking through the cross section of the ship.

A. Cross section?

Q. Yes.

A. All right.

Q. And that will illustrate the hatch coamings there too and hold?

(Witness marks on diagram.)

[fol. 168] Q. Looking at it as if it was cut right through. Now, this is the deck here (indicating).

A. Well, you want the cross section of the load?

Q. Yes, but showing it was built up from the deck. This is the deck here.

A. Oh.

Q. And use this for the hatch coaming here (indicating).

(Witness marks on diagram.) * * *

(Witness marks on diagram.) * * *

* * * * * * *

The Court: Is the map drawn now Mr. Duncan?

Mr. Duncan: Yes, the map is drawn your Honor. * * *

* * * * * * *

Direct examination (resumed).

Mr. Duncan:

Q. Mr. Spencer, you have now completed a drawing there, a rough drawing of a cross section of this ship as loaded, have you?

A. Yes. * * *

* * * * * * *

Q. And that is the payroll that Spencer signed after he was hurt?

A. I think he signed it. * * *

* * * * * * *

(The said document was thereupon duly received in evidence and by the Clerk marked Plaintiff's Exhibit Number 2.) * * *

Mr. Duncan: This is headed "Pay Roll, Voyage No. 59. We, the undersigned, late mariners on board the S.S. Fort Bragg of San Francisco, on her late voyage to Columbia River and return, now performed to this place of payment, each one for ourselves, with our signatures, acknowledge to have received of —— —— agent, for owners of said — the sum set opposite our names, it being in full amount [fol. 169] of our Wages for Services, and of all demands for Assault and Battery, or imprisonment of whatever name and nature, against said —, her owners, or officers, to the days of the date hereunder set against our names.

Dated, San Francisco, May 2, 1931." * * *

* * * * * * *

Q. Well, now, didn't they keep a record on board the vessel?

A. I think that they did, but the vessel was wrecked and the record, if on board, was lost at that time.

Q. Lost at what time?

A. At the time of the wreck of the steamer.

Q. In other words the Steamer Fort Bragg is now sunk, isn't it?

A. No, she was not sunk. She went ashore. She stranded.

Q. Oh, she stranded.

A. Yes, sir.

Q. And it is now a total loss?

A. Yes.

Q. In the mouth of Coos Bay?

A. Yes, on the south jetty.

Q. About two months ago?

A. I think it was two months. * * *

* * * * * * *

The Court:

Q. Was the hatch open or closed at that time, Mr. Witness?

A. Open your Honor.

The Court: Who said the hatch was open?

Mr. Duncan: Well, the plaintiff testified that the hatch was open.

The Court: At the time that his partner spoke to the mate, is that so?

A. Yes, your Honor.

Q. What did he say to the mate?

A. He asked the mate if he was going to close the open hatch.

[fol. 170] Q. What did the mate say?

A. And the mate said, "Never mind. Do your work."

Mr. Duncan:

Q. Now, that was—you started on this light lumber here after taking off the top load, that is, the load of lumber on top of the deck load, that is when you started down here, right next to the hold that he asked the mate about, is that so?

A. Yes. • • •

• • • • • • •

Q. Then there were at least six men working down in around this hold?

A. Around the hold.

Q. And two more probably up on top of the starboard side?

A. On the starboard.

• • • • • • •

The Court:

Q. When you piled lumber, in your experience, how did you pile it?

A. Well, it is customary, you know, to pile the lumber in a position like this one here (indicating).

Q. Pointing to what?

A. The outer edge of a deck load.

Q. Yes.

A. It is customary to put——

Q. Explain that in detail. How would your do it?

A. It is customary to pile it 12 inches high.

Q. Are you referring to timbers now, or boards and scantlings, timber?

A. No, not timber.

Q. Boards and scantlings?

A. Boards and scantlings.

Q. First you pile it 12 inches high?
A. 12 inches high.
[fol. 171] Q. And how wide?
A. Well, all over the deck.
Q. Then what?
A. Well, then you come up to the next 12 inches. You put laths, you know, about as thick as that (indicating.)
Q. You mean the next 12 inches on top of the first 12 inches?
A. Yes. You have laths.

Mr. Duncan:

Q. You mean laths—l-a-t-h-s?
A. Yes, they are about as wide as that. (Indicating.)

The Court:

Q. How are they placed?
A. Crossways.
Q. How many?
A. Well, in a distance of three or four foot from one to the other, on the outer edge only.
Q. On the outer edge?
A. Yes, they are about 3 or 4 foot long.
Q. They run crosswise?
A. Yes.
Q. Then on top of that what?
A. You put lumber again.
Q. And then what?
A. After you finish with the 12 inches across the deck you do the same way, proceed the same way.
Q. Crosswise with laths?
A. Yes.
Q. How high do you go?
A. Well, as high as the ship can carry the deck load.
Q. Well, how high is that?
A. Well, depending on how much she can carry.
Q. Depending upon the size of the deck and the ship, is that it?
A. That is what it is.
Q. Are you speaking of boards and scantlings when you say this?
[fol. 172] A. Well, with planks just the same. Boards, scantlings and planks.

Q. Not timber, though?

A. You even do it with timber. If you have loaded one tier of timbers all over the deck. Always you do on the outer edge, you put along laths.

Q. Well, these boards and scantlings that you say you were standing on——

A. Yes.

Q. (Continuing)—were they piled that way?

A. No, the load was landed.

Q. They were landed without the cross laths, is that it?

A. Yes.

. . . . . .

A. It is not a safe way if you haven't a binder.

. . . . . .

Q. Was that the—was there any custom about putting those heavy slings under a sling load in such position as that sling load was? . . .

. . . . . .

A. Yes. Why, you cannot get a load out without putting that heavy sling under.

Q. Yes. Was there any way of doing it other than the way you did it?

A. Well, I couldn't see any other way.

Q. Do you know of any other way?

A. Well, no, not that I know.

Q. Was it customary to do it any other way?

The Court: Were they in the habit of doing it any other [fol. 173] way?

A. Well, if there was a place, you know.

Mr. Duncan:

Q. I mean in this particular situation where you were at the time you fell?

A. Well, no, there wasn't any other way to do it.

Q. All right. Now, was there any custom or is there any custom about putting on the hatch covers on a vessel?

Mr. Street: Now, just a minute. Will you please qualify that to include the Fort Bragg? Vessels are not all alike.

I have no objection if counsel frames his question correctly.

Mr. Duncan: Well, if I understand it——

Mr. Street: It only goes to the form of the question, that is all.

The Court: Do you mean hatch covers on lumber vessels?

Mr. Street: Of this type.

The Court: Well, he says hatch covers on lumber vessels. Did you add, "Of this type"?

Mr. Duncan: Well, I will.

The Court: Read the question.

(Question read.)

Mr. Duncan: I will add to it to this extent: Where there is a deck cargo of lumber.

A. I didn't get you.

Q. Where there is a deck cargo of lumber?

A. Yes.

Q. The whole question is—if you will read it?

(Question read.)

The Court: What is the custom and practice, is that what [fol. 174] you want to know?

Mr. Duncan: Yes.

A. Yes.

Q. What is the custom?

A. The custom is—well, if you don't use the hold——

The Court: Is it the custom to keep the hatch covered or uncovered?

A. Covered.

Mr. Street: I object to that on the ground——

The Court: I will withdraw the question.

A. It is a custom to be——

The Court: Read the question that is in record.

(Question read.)

The Court: I will overrule the objection to that question. What is the answer?

A. Well, it is the custom to have the hatch closed.

Mr. Duncan: To have the hatch closed when?

A. When you don't use the hold.

The Court:

Q. When you don't use the hold?
A. Yes.
Q. Use the hold or hatch?
A. Yes.
Q. Hold and hatch are the same thing, aren't they?

Mr. Duncan: Yes, your Honor.

Q. Now, were you using the hold at all on the morning of this accident?
A. No.

. . . . . .

Q. At least, up to the time you fell?
A. Nothing going out and nothing coming in.
Q. Now is there any custom aboard ship, say on a lum- [fol. 175] ber ship, where there is an exposed edge of a pile of lumber, with regard to having any stanchions to support that lumber from toppling?

Mr. Street: Will you please read that question?

(Question read.)

Mr. Duncan:

Q. I mean after the lashings are removed, of course, when the vessel is in port?

The Court: You want to know if they put stanchions to support a pile of lumber on the deck?
Mr. Duncan: Yes, your Honor, to support—some timber of some kind.
The Court: What is your answer?

A. They do. On some vessels they do, and on some they don't, but that is the safest way.

Mr. Street: Now, I object to this witness testifying as to what is safe.
The Court: He has answered the question with that answer.
Mr. Street: I move the last part go out.
The Court: Well, some they do, some they don't, will stand. The rest of the answer will be stricken out.

Mr. Duncan:

Q. Now, is there a custom with regard to putting in laths to bind a load where there is an exposed edge of lumber that is going to be unsupported after they take the lashings off?

A. Yes.

Q. What is that?

A. Well, lumber which is piled or landed in the place like that, exposed——

Q. Like that—you are now referring to the way it was [fol. 176] put on the Fort Bragg, I take it?

Mr. Street: You are referring to your diagram now?

A. Yes, Well, it isn't the custom to have lumber landed in that place. That isn't the custom.

Mr. Duncan:

Q. It isn't the custom to have the lumber landed there at all, is it?

A. Yes.

Mr. Street: I object to that, if the Court please. He can testify as to what the custom is, but I don't think he can testify as to what it is not.

The Court:

Q. You said in your last answer it is not the custom to have lumber landed in that place, is that what you said?

A. Yes, your Honor.

The Court: That is his answer. Next question?

Mr. Duncan:

Q. Do you mean so close to the hatch coaming, is that what you mean?

A. Yes, that is what I mean.

The Court:

Q. Well, what is the custom, to land how far away from the hatch coaming?

A. Well, the custom is to pile that lumber in place like that, not to land.

Q. Is it the custom to have a place between the hatch cover and the lumber, a walking space around the hatch?

A. Well, that is the custom.

* * * * * * *

Mr. Duncan:

Q. If you quit and they did not discharge you, then what?

A. If I quit he has the right to hold my money back for three days.

Q. Did you have any money?

The Court: Any money coming to him?

[fol. 177] Mr. Duncan: Any money of his own to go back to San Francisco.

A. No, I didn't have none.

Q. And you were in Vallejo?

A. I was in Vallejo, yes.

Q. You lived in San Francisco?

A. I lived in San Francisco.

* * * * * * *

Cross-examination:

Q. By that you mean the ends were all evened up here (indicating)?

A. Yes, on the one end.

Mr. Duncan:

Q. Pointing to the after end?

A. Yes.

Mr. Street:

Q. They were all even on the after end?

A. Yes.

Q. But they were sticking out over here (indicating)?

A. Well, the other end, you know, one piece is one foot shorter, and one foot longer.

Q. I am talking about No. 9 now.

A. That is what I mean, you know. The other end didn't hold together even, you know.

Q. What other end?

A. The other end of the load.

* * * * * * *

[fol. 178] Q. All right, now, Mr. Spencer, 1 by 12 won't act that way, will it, won't topple over that way?

Mr. Duncan: How many 1 by 12's?

Mr. Street: All right, take eighteen 1 by 12's.

A. Well, it is just as dangerous, too.

Q. It is just as dangerous to work on 1 by 12's?

A. Yes. It has to be bound, you know. Without binding it is dangerous.

The Court:

Q. And with binding it is not so dangerous, is that it?

A. Yes, sir.

Q. That is the idea?

A. Yes, your Honor.

Mr. Street:

Q. You testified this morning, Mr. Spencer, and I believe also yesterday, that where there is an exposed edge you have laths in between?

A. Yes.

Q. So that is this No. 9 here that you were standing on——

A. Yes.

Q. Did have laths in between, then it was stowed just as the customs requires, wasn't it?

A. No, no.

• • • • • • •

Q. Isn't it a fact, Mr. Spencer, that while you were working there before you were hurt, the Captain came and told you how to do this job?

A. He came and told me?

Q. Yes.

A. Now, that is another story.

Q. Well, we will admit that that is another story. Is it a fact?

A. No.

Q. It is not?

A. He don't come and tell me what to do. That is what I [fol. 179] am there for. If I didn't know my work they would fire me.

Q. Isn't it a fact that he came to you and saw the way you were putting—stooping down and putting that sling load under there, and didn't he tell you, "You don't have to do that", that you could stand there and loop that wire under the end of that sling load?

A. No.

Q. Do you deny it?

A. No, he didn't. I didn't even see him.

Q. All right. That is all I want.

A. He was on the dock.

Q. All right, that is all I want.

A. He was on the dock.

The Court:

Q. Did he say anything to you at all?

A. No, I didn't see him. He wasn't on the boat at the time.

Mr. Duncan:

Q. Did he say he was or was not on the boat?

A. No. He was on the dock.

The Court:

Q. You didn't see him on the boat, is that what you say?

A. Yes.

Q. You saw him on the dock?

A. Yes.

Q. Did he speak to you from the dock?

A. No, he couldn't see me.

Mr. Street:

Q. Now, was he on the dock?

A. At that time.

Q. How do you know, Mr. Spencer? You were way down here with timbers all around you?

A. What?

Q. According to your story, you were way down here with timbers all around you. How do you know he was on the dock?

A. Because I could see. That is six foot.

[fol. 180] Q. You could see over 6 feet?

A. Well, when we took that load out. Listen now, Mr. Street. When we took that No. 6 load out, I was on top of that.

The Court:

Q. Could you see the Captain on the dock?

A. Yes, he was on the dock.

Mr. Street:

Q. I say, before you were hurt, earlier in the morning?

A. Earlier in the morning?

Q. Yes.

The Court: Well, now, what is your question? That the Captain spoke to him earlier in the morning?

Mr. Street: Yes, and warned him not to do——

The Court: Not immediately before this occurrence?

Mr. Street: No.

The Court: Well, there is another question. Earlier in the morning, sometime before this occurrence, did the Captain tell you how to put the sling on this lumber or give you any directions as to how it was to be done?

Mr. Duncan: How early, Mr. Street?

Mr. Street: Oh, I don't know what the time was any more than he knows when he was hurt.

The Court:

Q. Did the Captain an hour before, or at any time that morning before the accident, tell you how to put the sling onto this lumber, or did he give you any directions as to how it is to be done?

A. No. Hours before we was working——

Q. No. At any time?

A. Well, an hour before we didn't even work on that kind [fol. 181] of lumber.

Q. Before you went to work, or at any time that morning, or at any time before the time of the accident, did the Captain direct you how to do this?

A. He never spoke to me about any work.

Q. Never gave you any direction in regard to it?

A. No.

* * * * * * *

Mr. Street: Well, Mr. Witness, you said that this load was landed too close to the hatch, is that correct?

A. Yes, that is.

Q. Now, how close to a hatch should that load be landed?

A. Well that lumber there——

Q. Well, should there be any space between the load and the hatch on the deck in loading the lumber?

A. Well, that space can be wider.

Q. Can be what?

A. It can be left more space, you know, to walk around the hatch.

Q. Should space be left to walk around the hatch on the deck?

A. On the deck.

Q. I say, should that be?

A. Yes, it should be.

Q. It should be?

A. Yes.

Q. In other words, your statement is that the lumber should not be placed on the deck so close to the hatch that space—that there would be no space for a person to walk around the hatch, is that it?

A. Yes, your Honor.

[fol. 182] Q. There must be walking space around the hatch?

A. Yes, your Honor.

Q. That is what you say?

A. Yes, your Honor.

Q. And lumber should not be piled too close to the hatch to prevent such walking space, is that what you mean?

A. Yes, your Honor.

The Court:

Q. That is what you say?

A. Yes, your Honor.

The Court: That is his position.

* * * * * * *

Plaintiff's Rebuttal

* * * * * * *

Q. Now, you heard the Captain testify about some conversation he stated he had with you the morning before you

were hurt shortly after 8 o'clock about giving you some instructions as to how to pass a sling under a sling load. Did you hear his testimony?

A. Yes, I heard his testimony.

Q. Now, did you have that conversation?

A. I never had.

Q. Did you have any such conversation?

A. I had a conversation.

Q. With the Captain?

A. After the fall in.

Q. But I mean before you were hurt?

A. Before, not.

Q. Did you have any conversation with him before you were hurt?

A. No, none.

Q. Was it at all customary for the Captain——

Mr. Street: Now, I object to that.

The Court: Yes, I will sustain the objection. Did he warn you to be careful at all when he passed by? Did you hear [fol. 183] him say that?

A. I never heard about that, because I know when there is a danger that I have to be careful. I am watching out for that. They don't have to remind me of that.

* * * * * * *

Testimony of Walter Paul

Mr. Duncan:

Q. Did you say anything to the mate about the hatch covers being put on?

A. Yes.

Q. What did you say to him about that?

A. Well, I asked the mate when he told us to take that lot of lumber, I asked him if he wasn't going to put the hatches on first.

Q. You mean when he ordered you to work on this lumber close to the open hold?

A. Yes.

Q. And what did he say?

A. I don't remember exactly what he said, but I think he said it was not necessary, that we could get the lumber out without putting the hatches on.

• • • • • • •

Q. Now how long would it have taken to put those hatch covers on to close that hold?

[fol. 184] Mr. Street: I object to that on the ground it calls for his conclusion.

The Court: If he knows he can tell.

Mr. Street: We will stipulate it can be done in about ten minutes.

The Court: Let him answer if he knows. Do you know how long it takes to put those hatch covers on?

Mr. Street: I will withdraw the stipulation.

The Court: Well, that is the question. What is the answer?

A. About five minutes.

• • • • • • •

Mr. Duncan:

Q. When you asked if he was going to put the hatch covers on, was Spencer close to you?

A. Yes.

• • • • • • •

Q. And then how was Spencer putting the heavy sling under the slingload?

A. Well, he was—the slingload had not come quite clear of the other lumber so he was—he had to stick one end of the sling underneath.

• • • • • • •

Mr. Duncan:

Q. Was that the—the way Spencer put the sling under the slingload, was that the customary and proper way for any seaman to put a sling under a slingload under the circumstances existing with regard to this particular job of unloading?

Mr. Street: I object on the ground it invades the province of the jury, and move that the word "proper" be stricken. [fol. 185] The Court: Well, I will overrule the objection. "Proper and customary" is the question.

Mr. Duncan:

Q. Did you get the question?
A. Yes. It was the proper way on this particular load.
Q. On that particular load?
A. Yes.

The Court:

Q. What about the custom? Was there a custom in regard to it?
A. Yes, it was the custom.

Mr. Duncan:

Q. You mean to do it the way he did it?
A. Yes, sir.

* * * * * * *

Mr. Duncan:

Q. Was any cargo taken out of the hold or any cargo put in the hold at Vallejo that day?
A. Not that day.
Q. Not that day?
A. No.
Q. In other words, the hold was not used that entire day?
A. No.
Q. That is correct, is it?

The Court: That is the day of the accident, counsel?
Mr. Duncan: Yes, your Honor.

* * * * * * *

Q. Hasn't it been your experience on a trip when you are in port and you have got cargo in the hold and got cargo on deck to be working on the deck load and the mate come to you and say, "You fellow go down in the hold and start discharging from the hold"?
A. Yes, they have done that.

[fol. 186] Q. In other words, you might interrupt the work that you are doing, mightn't he?

A. Well hardly ever interrupt the work we are doing.

Q. No. He says, "Finish that job and then go down in the hold. We are going to discharge from the hold."

A. Yes, sir, sure.

• • • • • • •

Redirect examination.

By Mr. Duncan:

Q. Mr. Paul, assuming the facts to be that you are ordered to unload some lumber on a lumber vessel placed on the deck about four inches from the hatch coaming and running right straight up in successive slingloads to the top of some heavy timbers at the back of those slingloads—the timbers being about say 12 to 14 feet above the deck-load, and assuming that you are working on the forward part of that smaller lumber stowed in between the heavy timbers and the open hold getting them out with slings, what is the custom, if any, with reference to having the hatch covers on or off?

Mr. Street: Object to the hypothetical question.

Mr. Duncan: I will amend the question to this extent: assuming the facts to be that thos- heavy timbers are stowed between the bulwarks up to the single piles of successive slingloads of lumber, and that the heavy timbers extend to within about 40 inches—that is the edge of the pile of heavy timbers on top of the deck extends to within about 40 inches of the hatch coaming and that this smaller lumber, [fol. 187] say 1 by 8's or 2 by 4's, whatever it may be, is placed in there between these heavy timbers and the hatch. Now if you are ordered to work in such a place as that taking off—taking off this smaller lumber near the top of the heavy timbers—that is the smaller lumber between the heavy timbers and the hatch, what is the custom, if any, with reference to putting the hatch covers on or leaving them off?

• • • • • • •

A. The custom is to always put the hatches on.

Q. And when you refer to hatches, do you mean hatch covers?

A. Yes, strong-backs and hatch covers.

Q. They always put the strong-backs and hatch covers on?

A. Yes.

Q. Now did the circumstances I have outlined correspond to the circumstances on the "Fort Bragg" the morning you were unloading this lumber?

A. Yes.

Q. And the hatch covers were not on?

A. They were not put on.

* * * * * * *

The Court: If the hatch covers were on and the consignee came and wanted his lumber out of the hold, what would be the custom?

Mr. Duncan: Yes.

Mr. Street: Custom as to what?

Mr. Duncan: As to taking the hatch covers off and putting them on again.

Mr. Street: All right.

The Court: Well, what would happen, Mr. Witness?

[fol. 188] A. Well, we would take the hatches off.

Q. And then after the lumber was taken out what would you do?

A. Put the hatches back on again.

GEORGE S. BEADLE

Cross-examination.

Mr. Duncan:

Q. Now, Mr. Beadle, did you make up any rules or have any rules made up for the guidance of the officers aboard ship with regard to the—I am referring now to the Fort Bragg—with regard to loading and unloading operations? I mean safety rules, a set of safety rules that they should observe?

A. No sir.

Q. You didn't make up any kind of rules for their guidance?

A. No.

Q. Were they going by any safety rules?

Mr. Street: I object to that on the ground it is immaterial, invading the province of the jury. What if he did make rules? It doesn't make any difference.

The Court: Well, were they going by any rules, he said. That is proper.

A. No set rules that I know of.

Mr. Duncan:

Q. You didn't make up or promulgate any rules for them to guard against accidents to seamen?

A. Specific rules?

Q. Yes?

A. No.

. . . . . .

[fol. 189] Testimony of JOHN SAMUELSON

Q. You told him?

A. Yes.

Q. Not to go inside?

A. Not to go inside.

Q. With the sling. To sling that load that you were talking about right then?

A. Yes, sir.

Q. Is that it?

A. Yes, sir.

Q. Now, why did you tell him that?

A. Because I was afraid if he went inside he would fall down in the hold.

Q. Oh, I see. Was there anything going through the hold?

A. What is that?

Q. Was there anything—was that hold being used for cargo at all? Any cargo going in or coming out of it?

A. Not at that time.

Q. Now, you were afraid he would fall in the open hold if he did it any other way, is that it?

A. Any other way?

Q. Then the way you say that—according to what you told him?

A. Yes.

. . . . . .

Mr. Duncan:

Q. Isn't it a fact, Captain, that it is a general rule of safety on all vessels that whenever operations through the hatch are suspended or terminated, that the hatch covers should be put on or a safety line stretched around the hatch coaming to prevent people falling into the hatch?

A. When operations are suspended, yes.

• • • • • • •

Q. Then you don't know from where he fell, do you?

A. I didn't see him fall.

[fol. 190] Mr. Street: I will stipulate he did not.

Mr. Duncan: All right. You will stipulat- he didn't know from where he fell.

• • • • • • •

Testimony of William Vartnaw

Cross-examination:

Q. Isn't it a fact, as you say, that usually you pile the lumber by hand all over the deck?

A. Yes.

Q. Solid, that is a fact, isn't it?

A. Yes.

Q. That is the usual practice?

A. Yes.

Q. In other words—let me make sure that I understand you.

A. Yes.

Q. You usually, no matter what kind of lumber you have got, take it and pile it piece by piece?

A. Yes, sir.

Q. All over the deck?

A. Yes.

Q. So that it is a solid whole?

A. Yes.

Q. And this was unusual this trip?

A. Well, it was nothing unusual, only we put the timbers first, and then filled in three feet between the midships and the tank. Each side was 3 feet. We took the timbers in, and the lumber we put in amidships, and on top of the timbers that came in in Coos Bay.

Q. You put the timbers down on the deck and then piled these on top?

A. The timbers were on top of the lath, and there was a space in the midships that we described here yesterday, left between the tanks three feet, that was too short for [fol. 191] timbers. Timbers were about 52 feet long, and between the tanks was only 45 feet. So there was some space we had to fill with smaller lumber.

Q. In this case you couldn't pile the lumber by hand all over the deck as you usually did, because the long timbers would not go in between those steel tanks at each end of the hatch, that is so, isn't it?

A. That is so.

Q. And it left a space there of about 3½ feet or so——

A. Yes——

Q. (continuing)—that you wanted to utilize?

A. Yes.

Q. And on the previous trip that Spencer made the lumber was piled by hand all over the deck, wasn't it?

A. Yes.

Q. And as you usually did?

A. Usually. Well, I don't know. Well, we always did that way. That is usual.

Q. Oh, you don't remember that trip?

A. Well, I remember we had no*t* timbers.

Q. You remember you had no timbers?

A. No timbers like that. And so we put lumber all over. Worked it right across the deck from the hatch to the rail.

Q. From the hatch coaming——

A. To the rail.

Q. (Continuing)—to the rail?

A. Yes.

* * * * * * *

Q. Did you load the same way precisely on the starboard side as you did on the port side?

A. Yes, both sides alike.

* * * * * * *

Q. And why did you do that?

A. Well, they are more solid. Then they don't slip off.

Q. They are more solid with the laths every 12 inches?

A. Yes.

* * * * * * *

[fol. 192] Mr. Duncan:

Q. Would 2 by 3's, a landed load, be as solid as a piled load of 2 by 3's?

A. 2 by 3's won't be that.

Q. They won't be as solid?

A. No.

* * * * * * *

Q. Now, this book that you have referred to, does this show where on the deck these different kinds of lumber were placed?

A. No. It just shows which is put on deck and which is put in the hold.

Q. All this shows is that some of this cut lumber was put on the deck?

A. Yes.

Q. That is all it shows?

A. That is all.

Q. And it doesn't show where it was put?

A. No.

Q. Now, as to where it was put on deck, that is entirely from your memory, isn't it?

A. Yes.

* * * * * * *

Q. Now, I understand you to say, Mr. Vartnaw, that you didn't generally place any lumber in between the tanks this way; that you generally hand piled the lumber all over the deck between the bulwark and the hatch coaming, is that so?

A. Yes.

Q. And that is what you almost always did, wasn't it?

A. Yes.

Q. And was this the first time that you ever put lumber in that place, separate packages of lumber, between the two tanks and between heavy timbers and the hatch coaming?

A. Yes. That I remember.

Q. The first time that you ever did that?

A. That I remember.

[fol. 193] Q. Then this was a very unusual situation, wasn't it?

A. Not so unusual. But——

Q. Well, it is the first time you ever did it?
A. It is the first time I done it, yes.

* * * * * * *

Q. On the contrary, Mr. Vartnaw, wasn't it very unusual to order men to work on the edge of lumber, of a tier of lumber about 36 inches wide, piled between these timbers and the hatch coaming, over an open hold?

Mr. Street: I object to that, on the ground that it is argumentative, complex and compound.
The Court: Objection overruled.
Mr. Duncan: Will you answer that, please?
The Court: Read it.

(Question read.)

Mr. Duncan:

Q. When nothir going in or out of the hold? I will add that.

Mr. Street:

Q. Do you understand the question?
A. Yes, I understand the question.

The Court: If you don't it can be read to you again.

A. No, I understand it. It is not so unusual.

Mr. Duncan:

Q. Not so unusual?
A. No.
Q. But it was unusual?
A. It was not so unusual.
Q. Well, it was the first time that you ever did it, wasn't it, anyway?
A. Yes.

* * * * * * *

[fol. 194] Testimony of August Kruse

Mr. Duncan:

Q. All right. You say you remember. What do you remember about it? About the placing of that lumber?

A. I remember there was some 1 by 12's was stowed, and some was landed.

Q. Some was stowed and some 1 by 12's was landed?

A. Yes.

Q. You are sure of that?

A. I am sure of that.

Q. And where was the 1 by 12's stowed—hand piled?

A. Some was hand stowed underneath the landed loads.

Q. Underneath the landed loads?

A. Yes, sir.

Q. Right next to the deck?

A. Right next to the timbers.

Q. Right next to the timbers?

A. In that small space, about 3 foot space.

Q. And between the timbers and the hatch coaming on the deck?

A. No, that wasn't on the deck. There was something underneath yet. Some laths was underneath.

Q. And how high up did the laths go from the deck?

A. Laths came about a foot or so above the hatches.

Q. A foot or so above the hatches?

A. Above the hatch coamings.

Q. And then was there some 1 by 12's hand piled above that?

A. The 1 by 12's was stowed, hand piled, on top of the laths.

Q. On top of the laths. How many sling loads.

A. I don't remember how many sling loads.

[fol. 195] Q. You don't remember that?

A. No, sir.

Q. But on top of those were landed sling loads, were there?

A. Yes.

The Court:

Q. On top of what?

Mr. Duncan: On top of the 1 by 12's that were hand piled.

The Court: Then on top of those were what?

Mr. Duncan: Then on top of those were landed sling loads, he says.

Q. And you don't remember how many landed sling loads were on top?

A. No, I don't.

Q. Now, you say when you went forward to get a sling that you saw Spencer?

A. Yes, sir, I did.

Q. Who was working with him?

A. Another fellow was working with him.

Q. Who?

A. A fellow by the name of Paul.

Q. By the name of Paul?

A. Yes, sir.

Q. Were they working down in this narrow space between the heavy timbers and the hatch coaming?

A. There wasn't a narrow space.

Mr. Street: I don't think the witness has testified yet how narrow the space was.

Mr. Duncan: Absolutely he testified it was 3 feet.

The Court: Yes, he said that all along, about 3 feet.

Mr. Street: Very well.

A. They wasn't in that narrow space. It was almost [fol. 196] even with the hatches. I mean deck load.

Q. It was almost even with the deck load?

A. Almost even with the timbers.

The Court: What was?

A. The load what was landed on top of the stowed lumber.

Mr. Duncan:

Q. Almost even with the timbers?

A. Almost even with the timbers.

Q. The sling load they were getting out?

A. Yes, sir.

* * * * * * *

Q. Was it completely raised, or just one end of it?

A. Just one end of it.

Q. And was anybody standing on that load raised in that position?

A. Nobody was standing on the load.

Q. Now, where was Spencer standing when it was raised in that position?

A. He was standing in front of that load next to the open hatches.

Q. There were three other crews of men working there around the hold, weren't there?

A. How many?

Q. Three, of two men each?

A. Well, on the forward end was working two men on that side.

Q. What is that?

A. Both sides was working too sides.

Q. Two men?

A. The forward.

Q. Well, there were two men forward and two men aft on each side of the ship, wasn't there?

A. Yes, sir.

Q. So there were three crews working around that open [fol. 197] hold, wasn't there?

A. Yes, sir.

Q. Three crews of two men each?

A. Two men each, yes.

The Court:

Q. Three crews of two men each were working around the neighborhood of that hold, is that what you say?

A. There was eight men altogether.

Mr. Duncan:

Q. Eight altogether.

The Court: That would be four crews of two men each.

A. That would make four.

Q. Then working in the neighborhood of that hold, is that it?

A. Yes, sir.

* * * * * * *

Q. When it is hand piled?

A. When it is hand piled.

* * * * * * *

Q. Now, which tackle were they using, the forward tackle or the after tackle?

A. Forward tackle.

Q. And isn't it a fact that that forward tackle was geared so that the line of operations was forward from the end of this sling load that they had the pick-up sling under?

Mr. Street:

Q. Do you understand that question?

A. I understand. The tackle that was trimmed that way, the falls lead more aft from the load.

Mr. Duncan:

Q. If that is so, your line of operations would be more aft from where Spencer was, is that it?

A. Yes, sir.

Q. Well, isn't it a fact, however, that your line of operations—let me ask you this—it is a fact, isn't it, that in [fol. 198] regard to ship's tackle, working ship's tackle, taking loads in and out of a hold and landing them on the dock, that the tackle is trimmed so that you have one certain line of operations right straight across the ship, that is so, isn't it?

A. Yes.

Q. And you cannot vary that unless you change the booms?

A. Yes, sir.

Q. So that one straight line right across the ship, that is your line of operation. In other words, you take something out of the hold at one time, and according to the way the booms are fixed, it goes right straight up and right straight over onto the dock?

A. Not all the time.

Q. I mean, unless you change your booms?

A. Yes.

Q. That is so, isn't it?

A. The booms is sometimes trimmed that way, too.

Q. But whatever way the booms are trimmed, as long as they are trimmed that way, you have one certain straight line of operation?

A. One certain straight line.

Q. Always a straight line?

A. Yes, sir.

Q. And that cannot vary unless you change your booms, can it?

A. Except you trim the booms.

Q. That is, lower one, or something of the kind, move them?

A. Yes, sir.

. . . . . .

Q. All right. Now, this one that you said you saw him taking out was the one right up level with the timbers, was it?

[fol. 199] A. That was almost level with the timbers.

Q. Almost level with the timbers?

A. Yes, sir.

. . . . . .

Mr. Duncan:

Q. But you do know this sling load they were working on was up level with the top of the timbers?

A. A little below the timbers.

Q. How much below?

A. It would be only a few inches.

Q. A few inches?

A. Yes, sir.

Q. Only a few inches below the top of the timbers.

. . . . . .

Q. Where were you standing when you saw him in the hold?

A. I was standing on top of the lumber what was stowed.

Q. That was in other words, the top of the deck load?

A. Yes, sir.

. . . . . .

PAUL THORN, called as a witness on behalf of the plaintiff in rebuttal, and having been first duly sworn, testified as follows: 24 Coso Avenue, San Francisco, California.

Direct examination.

Mr. Duncan:

Q. Mr. Thorn, what is your vocation, what do you do?

A. I am an A. B.

Q. A. B. means Able Seaman?

A. Yes, sir.
Q. And how long have you been engaged in that vocation?
A. On steam schooners since 1911.
[fol. 200] Q. Along the Pacific Coast?
A. Yes, sir.
Q. And how long before that elsewhere, if any?
A. Since 1902, deep water.
Q. Deep water. You have—on lumber schooners you have had, then, experience since 1911, did you say?
A. Yes, sir.
Q. 1911—21 years?
A. 21 years.
Q. Loading and unloading?
A. Yes, sir.
Q. Steam schooners?
A. Steam schooners.
Q. And lumber steam schooners?
A. Yes.
Q. Along the Pacific Coast?
A. Yes.
Q. As an A. B. Seaman?
A. A. B.
Q. Now were you a member of the crew of the Steamship Fort Bragg on May 4th, 1931?
A. Yes.

Mr. Street: Stipulate he was.

Mr. Duncan:

Q. And how long had you been a member of the crew of that particular vessel?
A. About two months previous to the accident.
Q. And how many trips had you made?
A. Three trips.
Q. Three trips?
A. Yes, sir.
Q. Do you know the plaintiff, Alfred Spencer?
A. Yes, sir, I know him from the time he shipped in the Fort Bragg, you know.

• • • • • • • •

Mr. Duncan:

Q. Referring back to the sling loads on the dock, I understood you to testify already that the sling loads were

picked up and put in that place as they came from the dock?

A. Yes, sir.

[fol. 201] Q. Is that so?

A. Yes, sir.

Q. Now, you understand the place I am referring to?

A. Yes.

Q. Between the heavy timbers and the hatch coaming?

A. Yes.

Q. There was a place there about 3 feet wide, wasn't there?

A. About three feet.

Q. And between the two tanks on either end of the hatch?

A. Yes.

Q. Now, you say—let me ask you this: Were they all landed sling loads that were put in there, or——

Mr. Street: Now, wait a minute. That is enough. Anything else would be suggestive.

Mr. Duncan: All right.

The Court: Did he say that sling loads were put in there?

Mr. Street: Yes.

The Court: Then the question is were they all landed sling loads?

Mr. Street: That is proper, yes, but he is going to add an "or" now and give an alternative.

The Court: Yes.

Mr. Duncan:

Q. Were they all landed sling loads?

A. All landed loads, yes.

* * * * * * *

Mr. Duncan:

Q. Did you look down into the hold after he fell?

A. Yes, sir,

[fol. 202] Q. What did you see down there?

A. I seen him laying down. When he fell he landed on his feet and hit his head on a strongback. He landed on his feet and fell over on the strongback.

Q. Then what did he do?

A. Then he crawled out to get clear of the hatch, because some lumber was coming down after him.

Q. What kind of lumber was that?

A. I couldn't say what size it was, but there was some lumber over the loads.

Mr. Street: I object to the last answer as being a conclusion of the witness.

The Court: Well, that is his answer. I will let it stand. He cannot tell what kind it was.

Mr. Street: I will withdraw the objection.

Mr. Duncan:

Q. How many pieces came after him, about?

A. I couldn't say exactly. Maybe seven or eight pieces.

Q. There was more than one anyway, was there?

A. Yes.

• • • • • • •

Mr. Duncan:

Q. Is there any custom among —, say on steam schooners along the Pacific Coast with relation to putting on the hatch covers when there is a big load of lumber being unloaded from the deck, and there is no—and the hold is not being used and there is no cargo going into the hold or coming out of it, is there any custom?

Mr. Street: Just a moment. Will you also add to that the fact that there is lumber in the hold and that the Captain does not know when it is to come out?

[fol. 203] Mr. Duncan: No, because I don't think that has anything to do with it.

Mr. Street: Well, you are trying to hold this up to an absolute standard, and I don't think he can.

The Court: Read the question.

(Question read.)

The Court: The hold is not being used at the particular time they are taking this lumber off the deck, is that what you mean?

Mr. Duncan: Yes, your Honor.

The Court: Do you add that?

Mr. Duncan: Yes, your Honor.

The Court: I will overrule the objection.

Mr. Duncan: Is there such a custom?

A. There is.

Q. And what is the custom?

A. Put the hatches on when you work the deck.

Q. And that is an invariable custom, isn't it?

A. Yes.

* * * * * * *

Mr. Duncan: Is there any custom with reference to that situation when you were working as you were this morning unloading lumber from the inside of heavy timbers near an open hold, any custom with relation to putting on the hatch covers?

A. Well, I never seen lumber stowed that way.

Q. You never saw lumber put in between heavy timbers and the hatch coaming that way?

A. No, because it was such a small space.

Q. It was the first time you had ever seen that?

A. Yes.

[fol. 204] Q. And you cannot say whether there is any custom, because it is the first time, is that it?

A. Yes.

* * * * * * *

PLAINTIFF'S REBUTTAL

Mr. Duncan: I will read, if the Court please, from the deposition of John Delaney heretofore read from by counsel for the defendant, and referred to——

Mr. Street: Just a moment, until I get my copy, please.

Mr. Duncan: Page 3, direct examination by the attorney for plaintiff. (Reading.)

"Q. How long have you been an A. B.?

A. About twenty years.

Q. As such seaman, have you been engaged at various times in loading and unloading vessels?

A. I have, yes."

* * * * * * *

"Q. Do I understand you to testify that the space between the edge of the heavy timbers and the hatch coaming,——"

* * * * * * *

"Q. Between the hatch coaming was filled with small lumber?

A. Yes.

Q. What size were those pieces?

A. It was 2 by 3 or 2 by 4.

Q. About how long were those smaller pieces?

A. They ranged in length from 8 feet to 12 feet. All short stuff.

Q. About how wide were those? About how much space did those smaller pieces of lumber take up, that is, the [fol. 205] whole thing?

A. Maybe about three feet. I am not sure just exactly how wide it was. I would say three feet anyhow.

Q. Would you say it was approximately one sling load thick in width between the heavy timbers and the edge of the hatch coaming?"

Mr. Street: I object to that on the ground assuming facts not in evidence.

The Court: Objection overrules.

Mr. Duncan: (Reading.)

"A. Just about that."

* * * * * * *

"Q. Tell me, as far as you can remember, what kind of lumber was first loaded on the deck between the hatch coaming and the port rail?

A. Some timber, heavy timbers, and some small lumber.

Q. The heavy timbers, you say those were 12 x 12?

A. Something like that.

Q. How long were they?

A. 25 or 30 feet perhaps. I am not sure of the length.

Q. Where were they stowed? Were they right on the deck?

A. They were laying right on the deck.

* * * * * * *

"Q. Would landed sling loads be more apt to topple than a piled load?

A. I would say they would."

Mr. Street: No objection to that.

Mr. Duncan: Is it admitted?

Mr. Street: I don't see how you can get around it.

* * * * * * *

[fol. 206] EXCERPT FROM ARGUMENT UPON THE CAUSE CONCERNING THE INTRODUCTION IN EVIDENCE OF CERTAIN DIAGRAMS.

Mr. Street: Now, just a moment. I object to Mr. Duncan using those diagrams. They are not in evidence.

Mr. Duncan: Well, I think I am entitled to use the diagrams, your Honor, for the purpose of illustration.

The Court: We were to take that up in Chambers this morning, but we didn't do it.

Mr. Duncan: The witnesses all testified——

The Court: It appears by this blackboard that the witnesses when they testified drew these lines on the blackboard and referred to these lines on the blackboard, is that correct?

Mr. Duncan: Yes. Not on this side. On the other side. Counsel has turned it around so the jury could not see it.

The Court: If they referred to it I think you can refer to it in your argument.

Mr. Street: They ought to be in evidence, then.

Mr. Duncan: Well, you objected to their going in evidence.

Mr. Street: I do. But if you are going to use them, they ought to be in evidence.

The Court: There is no way of putting a blackboard in evidence.

Mr. Street: Well, Mr. Duncan can take a photograph of it.

[fol. 207] The Court: Well, at any rate, this side is not the side of the blackboard referred to by the witnesses.

Mr. Duncan: No, that is true, your Honor.

The Court: Well, turn that around. Let us see the side of the blackboard that was referred to by the witnesses during their testimony and the lines drawn there by the witnesses during their testimony.

(Mr. Duncan thereupon turned the blackboard around.)

The Court: Is that the board referred to by the witnesses in their testimony?

Mr. Duncan: Yes, your Honor. The plaintiff drew all those diagrams, practically. I started the top one, and he finished it, the plaintiff himself.

The Court: And he referred to that blackboard and those illustration- in connection with his testimony?

Mr. Duncan: Yes, it is all through the record, your Honor.

The Court: Well, to that extent, it is admissible. You had better take a photograph, if necessary, if you want to put it in evidence; but if the witness referred to it in his testimony, you are entitled to refer to it in your argument.

Mr. Duncan: He did, your Honor.

The Court: He drew those lines and referred to that board, both himself and other witnesses. Didn't Paul and others?

[fol. 208] Mr. Duncan: No, Paul was not permitted to refer to it; but the plaintiff drew it and——

The Court: And referred to it.

Mr. Duncan: And he referred to it all through his testimony.

The Court: Well, then, it is admissible.

Mr. Street: Now, just a moment, if the Court please. I refer, your Honor, to the evidence in the testimony of Mr. Paul, where the Court says, "If that diagram was in evidence you could refer to it, but it has not been introduced in evidence.

Mr. Duncan: Well, I am going to offer it in evidence."

The Court: Well, he offers it now.

Mr. Street: You offer it now, do you?

Mr. Duncan: I offered it before and you objected to it.

Mr. Street: And I object to it.

The Court: The objection will be overruled.

Mr. Street: Just a moment until I make my objection.

The Court: You made it heretofore, didn't you?

Mr. Street: No, I did not, your Honor.

Mr. Duncan: It was offered and counsel objected to it and it was not ever admitted.

Mr. Street: No, this is the first time it has been offered, and Mr. Duncan says, "Well, I am going to offer this in evidence", and then the Court says, "Well, so far as this [fol. 209] Witness is concerned you will have to make him use his own diagram." Now, my objection to those diagrams is this——

The Court: Those? There is only one there, isn't there?

Mr. Street: No, there are four, I think.

The Court: All right, there are three on one side of the blackboard.

Mr. Street: My objection is that the evidence discloses that they are not fair representations of the facts.

The Court: Well, I will overrule the objection. They are the representation of the facts, according to the plaintiff's testimony, and that stands for what it is worth. Whether it is true representation or not is a matter of cross examination, and also offering other diagrams, which the defendant would consider a true representation.

Mr. Street: And Mr. Duncan will make the photographs to put in evidence, will he?

The Court: I suppose it will have to be done to be put in evidence. Otherwise it won't be in evidence. There will have to be a photograph of it made.

Mr. Duncan: All right, your Honor. My point was this, your Honor: I don't see why the plaintiff should be compelled to make a photograph of that.

The Court: Anything you offer in evidence has to be a reality. It has to be in existence.

[fol. 210] Mr. Street: Well, if Mr. Duncan wants to put it in evidence, and the Court admits it over my objection, I will pay for the photograph in evidence. That is fair enough.

Mr. Duncan: Well, I think that is fair enough. My purpose was simply to refer to it in argument.

The Court: Well, if you refer to a diagram the other side can insist it be offered in evidence so that they can also refer to it. They can also attack it, if necessary. So the motion of the defendant that it be offered in evidence is reasonable. That is, at least, the suggestion of the defendant that if it is admitted in evidence it should be photographed and actually put in evidence.

Mr. Duncan: Yes, if he wants to pay for it——

The Court: Well, he says he will. He says he will volunteer to do so.

Mr. Street: Yes, we will, and I have no objection to the introduction of it on the ground that it was not introduced during the time that counsel was—before he closed his case. My only objection goes to those grounds I stated.

The Court: Very well. It is in evidence.

(The said diagrams were thereupon duly admitted in evidence and by the Clerk marked Plaintiff's Exhibit 9.)

* * * * * * *

Mr. Street: If the Court please, about this photograph here, it is stipulated, is it, Mr. Duncan, that after the photograph is taken it may be introduced in evidence and considered as your exhibit.

Mr. Duncan: So stipulated.

* * * * * * *

[fol. 211] INSTRUCTIONS GIVEN BY THE COURT OF ITS OWN MOTION

XV

Plaintiff alleges that the defendant has been guilty of negligence. The defendant denies that he has been guilty of any negligence and denies any responsibility in this matter. The defendant has also pleaded contributory negligence on the part of the plaintiff. Before the plaintiff can recover in this case he must prove by a preponderance of evidence that the defendant has been guilty of negligence. He must also prove that such negligence, if any, was the proximate cause of the injury. The only duty required of the defendant according to law was to provide a reasonably safe place for this plaintiff to work. If you find from the evidence that the defendant provided a reasonably safe place for the plaintiff to work, then your verdict must be for the defendant. If you find that the defendant did not provide a reasonably safe place for the plaintiff to work, then the defendant would be guilty of negligence; and provided you find that such negligence was the proximate cause of the in-

jury, the plaintiff can recover, even though you should find that the plaintiff was guilty of contributory negligence because contributory negligence is not a complete defense under the Jones Act, but would go in mitigation or diminution of damages only.

* * * * * * *

[fol. 212] XXVIII

Before the plaintiff can recover in this action it must first appear by a preponderance of the evidence that the defendant, or his servant, was guilty of some act of negligence which contributed proximately to the accident.

XXIX

The proximate cause of an event must be understood to be that which, in the natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred. It is the efficient cause, the cause without which the injury would not have occurred.

INSTRUCTIONS REQUESTED BY THE DEFENDANT AND GIVEN BY THE COURT AS AMENDED

III

The plaintiff in this case was a seaman and although he may not have signed articles he was, as a seaman, entitled, under the maritime law, to be cured at the expense of the defendants without reference to any question of negligence. If you find, therefore, that the defendant(s) placed the plaintiff in a hospital and furnished him with medical attention at (their) [his] own expense, you are not to construe such act(s) on (their) [his] part as an admission that (they were) [he was] in any way responsible for the plaintiff's injuries. Furnishing the plaintiff with medical attention [fols. 213-216] was something which the defendant(s were) [was] bound to do (no matter how) [even if he was] free from negligence. (they were).

(Portions in parenthesis stricken out by the court and portions in brackets added by the court.)

V

You are hereby instructed that the defendant George S. Beadle [was bound to provide plaintiff with a reasonably safe place to work but] was not bound by law to furnish the plaintiff with a place to work which was absolutely safe. An employer does not insure the safety of his employees.

(Portions in brackets added by the Court.)

Given as amended.

E. P. M., J.

[fol. 217] [File endorsement omitted]

[fol. 218] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

RESPONDENT'S DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE INSERTED IN APPELLANT'S TRANSCRIPT ON APPLICATION TO THE U. S. SUPREME COURT FOR A WRIT OF CERTIORARI, AND TO BE CERTIFIED AS A PART OF SAID TRANSCRIPT, AND TO BE PRINTED AS A PART THEREOF, AND OBJECTIONS TO AND MOTION TO STRIKE PARTS FROM SAID PROPOSED TRANSCRIPT—Filed Dec. 19, 1935

To the Clerk of the Supreme Court of the State of California:

Alfred Spencer, the respondent in the above entitled matter, hereby requests that you prepare and certify to the Supreme Court of the United States the hereinafter designated portions of the transcript of record in the above case now lodged in your Court which are additions and/or amendments to that portion of the record heretofore designated by George S. Beadle as appellant and petitioner herein in his Præcipe filed with you on December 9, 1935, which portions of said record of your court should be in- [fol. 219] serted in the proposed transcript as heretofore made up in accordance with petitioner's said Præcipe; and strike from said proposed transcript the following, to-wit:

Add the Following Parts of Reporter's Transcript

Alfred Spencer:

Commencing at page	Commencing at line	Ending at page	Ending at line
49	4	49	19
51	6	51	7
67	5	67	7
103	8	103	9
103	24	103	26
104	15	104	26
106	2	106	12
126	1	126	17
132	11	132	14
175	2	176	24
186	15	186	15
312	15	312	17
313	4	317	16
315	13	315	16
347	8	347	17
365	13	365	25
392	2	393	11
426	15	429	3
734	7	735	8
789	8	790	1

Walter Paul:

450	22	451	6
451	11	451	23
452	9	452	11
458	1	458	4
459	13	460	3
463	10	463	18
480	19	481	3
491	5	492	5
492	18	493	1
519	22	520	7

George S. Beadle:

523	4	523	24

Parts of Reporter's Transcript—Continued

John Samuelson:

Commencing at page	Commencing at line	Ending at page	Ending at line
683	1	683	16
688	10	688	15
690	24	691	2

[fol. 220]

William Vartnaw:

599	25	601	14
604	7	604	8
617	6	617	9
620	6	620	9
639	25	640	8
646	16	647	5
648	9	649	4

August Kruse:

712	14	714	21
716	7	716	13
717	12	718	4
719	23	719	23
720	10	721	19
725	6	725	9
727	5	727	10
728	10	728	13

Paul Thorn:

764	1	765	6
767	13	768	14
773	7	773	25
778	9	779	9
779	26	780	12

John Delaney:

745	4	745	16
748	4	748	6
748	21	749	14
749	25	750	8
751	14	751	18

Excerpt from Argument of Plaintiff's Counsel as to Diagram:

815a	9	815f	10

Add to and insert in:

"Instructions given by the Court of its own motion:"

Instruction No. XV, commencing at page 826 line 10 and ending at page 827 line 3.

Instructions No. XXVIII and XXIX, commencing at page 832 line 17 and ending at page 833 line 1.

Add to and insert in:

"Instructions requested by the Defendant and given by the Court as amended:"

Instruction No. III, commencing at page 838 line 11 [fol. 221] and ending at page 838 line 36.

Instruction No. V, commencing at page 839 line 14 and ending at page 839 line 23.

Strike Out the Following Parts of Proposed Transcript

a. That fragmentary portion of opening statement of plaintiff's counsel on page 18 of said proposed transcript line 18 to page 19 line 5 on the ground that same is not evidence in the cause.

b. The opinion of the District Court of Appeal of the State of California made December 28, 1934 set forth on page 146 of said proposed transcript requested in Petitioner's Præcipe as item 14; on the ground that said opinion is of no legal force or effect as it was set aside and superseded by the opinion of the Supreme Court of the State of California, requested as item 15 of said Præcipe, which opinion is included in said proposed transcript.

c. Defendant's proposed instruction numbered V, page 140 line 20 to page 140 line 26 of Petitioner's proposed transcript on the grounds that defendant and appellant has never assigned such omission to give such instruction as error and has not briefed or argued any objections in the Appellate Court to the omission to give such instruction.

d. Defendant's proposed instruction numbered VII, at page 141 line 6 to page 141 line 18 of Petitioner's proposed transcript on the same grounds.

[fol. 222] e. Defendant's proposed instruction numbered IX, at page 142 line 1 to page 142 line 19 of Petitioner's proposed transcript on the same grounds.

f. Defendant's proposed instruction numbered XVI, at page 144 line 13 to page 144 line 22 of Petitioner's proposed transcript on the same grounds.

Insert affidavit of A. Don Duncan regarding failure to object to omission to give said instructions, and regarding diagram, filed December 19, 1935.

Dated San Francisco, California, December 19, 1935.

A. Don Duncan, Attorneys for Plaintiff and Respondent Alfred Spencer. John L. McNab, of Counsel.

[fol. 223] Receipt of a copy of within Præcipe Designating Parts of Record to be Incorporated in Petitioner's Proposed Transcript and to be Printed as a Part Thereof, is admitted this 19th day of December, 1935.

Harold M. Sawyer, Attorneys for Defendant and Petitioner.

Receipt of a copy of Additional Parts of Record to be Inserted in Appellant's Proposed Transcript on Application for Writ of Certiorari to the U. S. Supreme Court, and to be Printed as a Part Thereof, is admitted this 19th day of December, 1935.

Harold M. Sawyer, Attorneys for Defendant and Petitioner.

[fol. 224] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 17, 1936

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.